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R E P O R T S

OF

CASES

ARGUED AND DETERMINED

ON THE

EQUITY SIDE

OF THE

Gr. Brit **COURT OF EXCHEQUER,**

BEFORE THE RIGHT HONOURABLE

SIR RICHARD RICHARDS, KNIGHT,

LORD CHIEF BARON,

During the Years 1817, 1818, 1819, and 1820.

By EDMUND ROBERT DANIELL,

OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

LONDON:

**JOSEPH BUTTERWORTH AND SON,
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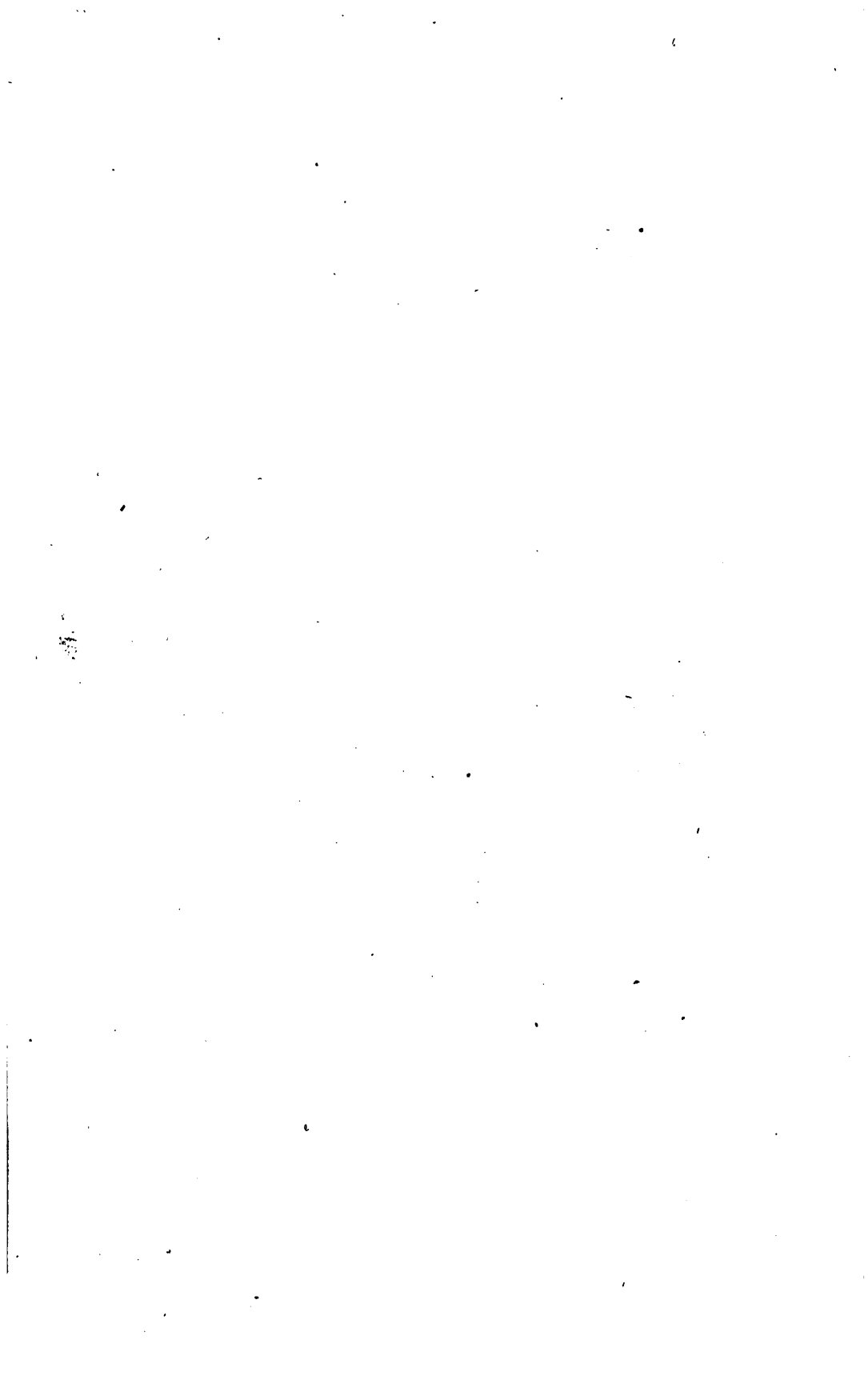


SIR RICHARD RICHARDS, Lord Chief Baron.

SIR ROBERT GRAHAM,
SIR GEORGE WOOD,
SIR WILLIAM GARROW, } Barons.

Attorney-General, SIR SAMUEL SHEPHERD.

Solicitors-General, { SIR ROBERT GIFFORD.
 { SIR JOHN SINGLETON COPLEY.



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R E P O R T S
 OF
CASES
 ARGUED & DETERMINED
 ON THE
 EQUITY SIDE
 OF THE
COURT OF EXCHEQUER

Commencing in the Sittings before
TRINITY TERM,
 57 Geo. III. 1817.

HITCHCOCK v. GIDDINGS.

*Gray's Inn
 Hall,
 June 4th.*

THOMAS MILLARD being possessed of certain freehold and leasehold estates, devised all his real and personal property to *Mary Gill* and *Ann Wrentmore* for their lives, and after the death of the survivor of them to *Sandy Wrentmore Gill*, and *Ann Wrentmore Colmer*, and the heirs of their respective bodies, as tenants in common in tail; and directed that, in case either of them should die without issue, then the part of the one so dying should go to the survivor of them, and the heirs of his or her body; and in case of failure of issue of both, he limited the property to two persons of the name of *Vowle*, in fee.

A vendor is bound to know that he actually has that which he professes to sell. And even though the subject matter of the contract be known to both parties to be liable to a contingency which may destroy it immediately, yet if the contin-

gency has already happened, the contract will be void.

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After the testator's death, *Giddings*, the defendant, purchased of the *Vowles* their reversionary interest under *Millard's* will; and, in the month of *April*, 1810, was applied to by the plaintiff *Hitchcock*, to sell it to him.—The defendant at first refused, but was afterwards prevailed upon by the plaintiff to sell him his interest in one moiety of the estates in question for the sum of £5000; and an agreement to that effect was accordingly drawn up and signed by the parties.

On the 3d of *May* following, an indenture of bargain and sale was executed, by which the interest of the defendant in one moiety of the property of the testator, *Thomas Millard*, subject to the life-estates of *Mary Gill* and *Ann Wrentmore*, and to the estates tail of *Sandy Wrentmore Gill* and *Ann Wrentmore Colmer*, was duly conveyed to the plaintiff. The plaintiff, however, did not pay the purchase money at the time, but gave the defendant his bond for securing the payment of it with interest. He afterwards paid the sum of £250 for interest, but never discharged any of the principal.

It was subsequently discovered, that the tenants for life, together with *Ann Wrentmore Colmer*, who was the surviving tenant in tail, had, previously to the contract with the plaintiff, suffered a recovery, and thereby destroyed the remainder by the will limited to the *Vowles*, and that consequently nothing passed by the bargain and sale from the plaintiff to the defendant.

In consequence of this discovery the plaintiff filed his bill, praying that the bond, given by him to the defendant for £5000, might be declared to have been fraudulently obtained, and that it might be delivered up to be cancelled, and for a re-payment of the money already paid for interest, and an injunction in the mean time.

The bill charged that the defendant, at the time the contract was entered into, knew the recovery had been suffered, but kept back that fact from the plaintiff. This was positively denied by the answer, and no evidence was given to fix such knowledge upon the defendant.

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It appeared by the evidence, that the plaintiff employed his own solicitor to prepare the conveyance, who laid a draft of it, together with an abstract of the defendant's title, before Mr. *Bridgman*, a conveyancer at *Bath*, who, in the opinion, which he gave upon the title, adverted to the power which the tenant for life and tenant in tail had of barring the remainder proposed to be purchased. On the 19th day of *April*, the defendant went to the office of plaintiff's solicitor for the purpose of answering certain queries which had been made on the margin of the abstract by Mr. *Bridgman*; and on that occasion the plaintiff's solicitor asked him, whether any recovery had been suffered? and he then stated it to be his belief that none had; and in the afternoon of the same day a similar enquiry was made in the presence of the plaintiff, when the defendant returned the same answer, upon which the plaintiff expressed himself to be perfectly satisfied. The same assurance was given by the defendant at a subsequent meeting which took place between him and the plaintiff, when the plaintiff again expressed himself satisfied with the bargain, and said he could make £10,000 by it, and offered to purchase the remaining moiety, which was declined on the part of the defendant. On the same day the plaintiff's solicitor insisted on his accompanying him to Mr. *Bridgman's*, to have some further conversation on the subject of the purchase; on which occasion Mr. *Bridgman* stated, that the only difficulty in the title was, that a recovery might have been suffered, and recommended a search to be made, when the plaintiff observed, that he was satisfied with the purchase, that it was worth £10,000, and that he

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had lately been in *London* and had made a search, and that no recovery had been suffered. He then directed his solicitor to proceed with the engrossment of the deed, and on the *Thursday* following it was executed. Afterwards, when his solicitor informed him that a recovery had been suffered, and shewed him an extract of it, the plaintiff treated it with great indifference, and expressed considerable anxiety to purchase the remaining moiety.

Mr. *Fonblanque*, and Mr. *Wingfield*, for the plaintiff.—This is a contract which a court of equity will set aside. It was entered into under a mistake; the defendant supposing he had some interest in the estate agreed to sell it to the plaintiff, who purchased it under a similar notion: it afterwards turned out that the vendor had no interest whatever. This is clearly a case in which a court of equity will interfere to prevent the contract, while yet incomplete, from being enforced. There is a difference between contracts executed and executory: where the performance has been complete the Court will not undo it; but where it is incomplete, and it is founded on a clear mistake, the Court will interfere to prevent the party being called upon to complete it. The contract here is executory. The execution of the bond cannot be considered as performance. In most cases, where a party cannot perform his engagements at the time stipulated, a security is given. Here was an express, or at least an implied, engagement that no recovery had been suffered. The fact of the plaintiff having made the search for the recovery himself, rebuts the supposition of its being a matter of indifference to him, as does likewise the fact of his having become the purchaser,

Mr. *Martin*, and Mr. *Heys*, for the defendants.—The case made by the bill is fraud, and nothing has been ad-

duced in evidence which goes to establish such a charge, and indeed all idea of fraud is totally rebutted. The bargain is not of the defendant's seeking; the plaintiff seeks him, and is so well satisfied with his bargain, that even after he has heard of the recovery he proposes, if the defendant think fit, to purchase the other moiety. This part is material with respect to costs. Where a plaintiff imputes fraud and fails, he ought to pay the costs. There is no doubt this is a mistake; but if parties choose to speculate, and one sells a contingency, and the other buys it, if the contract be complete, the Court will not interfere. At law, if a party aware of the circumstances pay money which he is not compellable to pay, he cannot recover it (*a*). The defendant never gave any assurance that no recovery had been suffered; he only said, it was his belief that none had. The plaintiff, apprized of the objection, goes to *London*; and having made a hasty search, returns into the country, and insists upon completing his contract, and that upon terms which clearly imply he is aware he is purchasing a contingency; for he says he shall make £10,000 by his bargain. He is aware that his title is such as must be blown away, if the tenant for life and tenant in tail join in a recovery, and persists. It turns out that the act has been done which he was forewarned might be done. Suppose it had been done, the next morning: he would have been in no better situation; and yet it is not pretended, that, in such a case, he could have been relieved. The only question then is, whether the bond be not payment? A bond has always been considered as the close of a transaction, and even a solicitor's bill will not be unravelled if a bond has been given for the amount of it. Suppose the plaintiff had given negotiable notes for the amount, would they not have been considered as payment? Why then should a party having a

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(*a*) *Bilbie v. Lumley*, 2 v. *Dacres*, 5 Taunt. 143.

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higher species of security be in a worse situation than he would have been in if he had taken a lower.

The payment of interest was a confirmation of the transaction. At all events there is no pretence to say, that what has been already paid must be returned : to this extent the transaction must be considered as complete.

Mr. *Fonblanque* in reply.—Although the bill imputes the transaction to fraud, I am justified in taking the ground of mistake. The objection that the plaintiff, notwithstanding he knew of the recovery, persisted in his bargain, is absurd ; it implies a state of mind which ought to subject him to protection under a commission of lunacy. But in point of fact this was not the case : the plaintiff upon being apprized of the objection made all the requisite enquiries, and at the time he executed the deed, was under the impression that no recovery had been suffered. The defendant himself had stated his belief to be, that none had.

The bond cannot be considered as payment ; it is merely an extension of the time appointed for the performance of the contract.

The payment of interest is no confirmation ; it was made under the idea that the bond was in force : the plaintiff is therefore entitled to a re-payment.

LORD CHIEF BARON.

There certainly is in this bill a charge of fraud, which has been established, namely, that the defendant agreed to sell to the plaintiff an estate in which he had no interest. This is fraud in a court of equity ; though, perhaps, under the circumstances of this case, it is not so in a moral point of view.

It has been said that this is a contingency, and that if a party having a property of which a certain event may defeat him, and being ignorant that such event has taken place, sell his estate to another, who being aware of the contingency upon which it depends, agrees to take the estate on those terms, the Court will not relieve from so improvident a bargain; and certainly, where a party is determined to speculate and purchase an interest, which he is aware may be defeated on the happening of a contingency, which neither he nor the vendor is able to control, it is a foolish contract, but not such as a court of equity will interfere to set aside (*a*); but then it must be clear that the contingency by which the estate may be defeated, has not taken place.

Here is an estate which, if no recovery had been suffered, was a good one. Both parties being equally igno-

(*a*) If the object of the purchase be subject to a contingency which has not already taken place, but which may take place, even before the agreement is mutually carried into effect, equity will enforce the performance, though such contingency should so happen. As where the agreement respects an interest determinable on lives, and one or more, or even all the lives fall before the purchase-money is paid, equity will, notwithstanding, decree payment of the purchase-money. *Cass v. Rudele*, 2 Vern. 280. *White v. Nutt*, 1 P. Wms. 61. *Ex parte Manning*, 2 P. Wms. 410. *Mor-*

timer v. Capper, 1 Bro. C. C. 156. *Henley v. Acton*, 2 Bro. C. C. 17. *Jackson v. Lever*, E. 1792; and the reason appears to be, because the nature of the contract involving such contingency, the terms of it must be supposed to have been governed or influenced by the uncertainty of the time when it might happen. 1 Fonbl. Treatise, c. 5. s. 8. p. 362. n. But then it must be clear, that the contingency has not taken place before the contract was entered into; for if it has, a court of equity will interfere to set it aside. *Hitchcock v. Giddings*, supra.

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rant that a recovery had been suffered agree for the sale and purchase of the estate, and the purchaser is content to abide the risk of a recovery being subsequently suffered. He conceives, however, he is purchasing something; that he is purchasing a vested interest. He is not aware that such interest has already been defeated. The defendant thinks he has some interest; and the plaintiff thinks he is purchasing that interest: but this is not sufficient; the party selling must be satisfied that he actually has an estate to sell. Here he only *thought* he had it, when he had it not. He ought to have *known* that he had it.

The execution of a bond for securing the payment of the purchase-money is not a completion of the contract, and where fraud is made out the court will relieve against it.

It has been argued that this bond must be considered as payment; and it has been said that even in the case of solicitor's bills, where a bond has been given for the balance, the courts will not unravel them; but that is because it must be supposed that, before so solemn an instrument is entered into, the parties have ascertained that the accounts are correct: but even in that case if the court can be satisfied that the bond has been unfairly obtained, it will relieve against it (a).

In this case a fraud has been practised by defendant, I do not mean in a moral point of view, but such as a court of equity will relieve against. He has sold that

(a) Equity will order an attorney's bill to be taxed, though he has a bond, or mortgage, or judgment for the amount, and even after payment of it. *Walmsley v. Booth*, 2 Atk. 29. *Drapers' Company v. Davis*, 2 Atk. 295. *Newman v. Payne*, 4 Brq. CC. 350. 2 Vez. Jun. 199. But it

is not a matter of course, for after long acquiescence and a security given, the court will not interfere, unless upon a special case of fraud or grossly improper charges. *Langstaffe v. Taylor*, 14 Vez. 262. *Cooke v. Settree*, 1 Vez. and Beam. 126. *Plenderleath v. Fraser*, 3 Vez. and Beam. 174.

which he had not,—and shall the plaintiff be compelled to pay for that, which the defendant had not to give?

With respect to the interest, that follows the bond.— If application had been made for an injunction before payment, the court would have prevented it: it must be repaid.

With respect to costs, both parties have acted with an equal degree of folly; and one ought not to be in a better situation than the other. Both parties must pay their own costs.

Decree, Wednesday the 4th day of June, 1817.—It is ordered, adjudged, and decreed, by the court, that the defendant do deliver up to the plaintiff the bond in the pleadings of this cause, mentioned, to be cancelled. And it is further ordered by the court that it be, and it is hereby referred to the deputy to his Majesty's remembrancer of this court to take an account of what has been paid by the plaintiff to the said defendant for interest, or otherwise, on account of the said bond. In the taking of which account the said deputy remembrancer is to make to all parties all just allowances; and all parties are to

produce, &c. And it is further ordered by the court that the said defendant do repay to the plaintiff what (if any thing) upon taking the said account, shall have been received by the said defendant for such interest, or otherwise, on account of the said bond, as aforesaid. And it is further ordered, that the injunction heretofore granted in this cause, to restrain the said defendant from proceeding at law against the said plaintiff upon the said bond, be, and the same is hereby made perpetual; and it is further ordered that each party do bear and pay his and their own costs of this suit.

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Where a bond is void, a repayment of interest which has been paid on the supposition of its being valid, will be decreed.

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June 5th.

BENNETT, Clerk v. SKEFFINGTON.

The mere fact of payment from a period anterior to the 13th Eliz. will not be sufficient to establish a composition real. The deed or instrument by which it was made must be produced, or some evidence given, to shew that it has existed.

THIS was a bill for tithes, filed by the rector of the parish of *Skeffington*, in the county of *Leicester*. The defendants by their answer set up a composition real, entered into before the 13th Eliz. between the then rector and the owners of certain closes or parcels of land within the parish, called the *ancient meadows*, (being the lands in question) *and all other competent and necessary parties*, by which composition an annual sum of 40*l.* was made payable to the rector by the owners or occupiers of the said closes or parcels of land, by equal half yearly payments.

In the year 1807 a bill was filed by the present rector against the occupiers of the same lands, for an account of tithes up to that time; and the cause came on to be heard in December, 1810, when the defendants set up the uninterrupted payment of the sum in question *as a modus*; to rebut which, the plaintiff read as evidence the testimony of witnesses in a cause in this court, in the year 1715, between the then rector and an occupier of some of the lands in question, which went to prove that 150 years before that time, upon an enclosure taking place of part of the lordship of *Skeffington*, an agreement was made between the then rector and the proprietors, that a composition of 40*l.* should be paid in lieu of all tithes arising from all the new enclosures. This evidence was held to be conclusive against the *modus*, since it shewed a commencement of the payment posterior to the time of legal memory (*a*).

(a) *Bennett v. Neale*, Wightw. 324.

The bill now before the court was for the tithes subsequently accrued on the same lands, and the same annual payment was set up as a composition real.

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The defendant proved the regular payment of the 40l. per annum, and read the testimony of the witnesses in the cause in 1715, before alluded to, but produced no other evidence to shew that any deed of composition or agreement in writing ever existed.

Mr. Fonblanque, Mr. Martin, and Mr. Dowdeswell, for the plaintiff, contended that they ought either to produce the deed, or give some evidence to shew that such an instrument had existed, and that the payment of a sum of money would not alone be sufficient to establish a composition real, and cited the former case of *Bennett v. Neale (a)*.

Mr. Dauncey, and Mr. Boteler, for the defendants.— In that case the question was not argued at all; the sole question was, whether after having set up a modus, it was open to the defendants to take advantage of the evidence produced by the plaintiff to prove the existence of a composition real. The evidence in the former case overthrew the modus, as it shewed a commencement of the payment, subsequent to the time when such a payment could be considered as a modus. The evidence now shews an agreement entered into for such payment anterior to the restraining statute of the 13th Eliz. and the question is, whether the court will decide that this ought to be set aside, or will let it go to a jury? The evidence shews an agreement, stated to have been made between the rector and parishioners, not exclusively, but with all other competent and necessary parties. It will be said

(a) Ante.

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that such an agreement was void, unless the patron and ordinary were parties; but after 300 years the court will presume that it was made with the concurrence of all necessary parties (a). If a written document be necessary to support the defendant's case, it must be admitted we have it not, nor any copy of it, nor can we produce any witnesses who ever saw it: but there are traces of the existence of such an instrument. The evidence points at a particular period. Most cases which have been decided have been those of mere naked payments: but here the evidence goes further, and points at a particular time; it shews that an enclosure took place, and that at that time the agreement which has been mentioned was entered into.

LORD CHIEF BARON.

The case is simply this: here is a demand for tithes; the defendants say they are not liable, because there is a composition real affecting the lands in question. This is proved by shewing that at a given time an agreement was made (to put it in the strongest light, we will say by all necessary parties,) but no evidence at all is given to prove that any written instrument ever existed. In this state of the case, were I to decide in favour of the defendants, I should be overturning all the cases on the subject. There must be some evidence of a deed of composition in writing between all necessary parties (b). There is no evidence

(a) The consent of the ordinary to a composition real may be presumed from length of time. *Saxbridge v. Bruton*, 4 Gwill. 1397. 2 Anst. 372. S. C.

(b) Although it is not necessary to produce the deed of composition. *Chapman v. Monson*, 2 P. Wms. 573. Yet there must be evidence tending to shew that such a deed

here but proof of a payment for a long course of time, and a date fixed for the commencement of that payment.

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Account decreed.

has been executed. *Robinson v. St. Edmunds v. Wright*, Com. Appleby, 3 Gwill. 1101. *Smith R. 643. Ekin v. Pigot*, 3 Atk. v. *Goddard*, Exch. Mich. T. 298. *Knight v. Halsey*, 2 Bos. 1777. *Heathcole v. Main- and Pul. 306. Bennett v. Skeffington*, supra. *Bury*

WILLIAMS, Clerk, v. PRICE and Others.

Gray's Inn Hall,
June 5.

THIS was a bill by the Vicar of the parish of *Romsey*, in the county of *Southampton*, against the occupiers of certain lands within the parish, for an account of various descriptions of small tithes taken by them from the lands in their occupation.

The words *gardens, curtilages, and allerge* in an endowment will not give a vicar the tithe of *potatoes and turnips*, or of any other article not known in *England* at the time. But where there appears to have been a general perception of all small tithes by the vicar, a subsequent endowment will be presumed of small tithes of every description under which the rector will be entitled to these articles.

The perception of most of the titheable matters sought was admitted by the answers; but a claim to some of them was set up by the impropriate rectors, who were therefore made parties to the suit.

The principal question in the case was, whether the plaintiff, as vicar, was entitled to the tithe of potatoes and turnips grown in fields.

In support of the vicar's right, an old endowment of the Bishop of *Winchester* in the year 1322 was read, by which it was declared, "that the vicar, and his successors for the time being, should receive the tithe of flax, hemp, apples, pigs, geese, cows, milk, cheese, calves, pullen,

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honey, pigeons, handicraft trades, *gardens, curtilages*, eggs, and also confessions, funerals, and legacies given by the dead (except, &c.); and also all that portion of tithe hay, viz. &c.; and also all *offerings and oblations at the altar of St. Lawrence*, or any where else in the same church, howsoever or wheresoever arising, or by whatsoever name they were called, which theretofore belonged to the two prebendaries therein-mentioned, &c."

There were also read, on the part of the vicar, certain admissions which had been agreed upon by the parties, by which it appeared that for upwards of fifty years payments had been made to the vicar in lieu of tithes of hop gardens in the parish, of from two to five acres in extent; and also that various payments had, for eight years preceding, been made to the vicar in lieu of the tithe of potatoes grown in fields of several acres.

Mr. *Martin*, and Mr. *Wray*, for the plaintiff.—The word *gardens* in the endowment will carry all garden-stuff wherever grown; that potatoes and turnips were originally cultivated in gardens, there can be little doubt, and consequently, under the endowment of the tithe of gardens, the vicar must be considered as entitled to those articles, although grown in fields. In all cases of small tithes, no matter how extensive the cultivation may be, they are still small tithes (a) Lord *Hardwicke*, on his attention

(a) The true distinction between great and small tithes does not depend on the quantity or locality of the things titheable, but on their nature; so that things properly coming under the description of small tithes, such as potatoes, &c. do not change their nature by being sown in great quantities in a common field. *Smith v. Wyatt*, 2 Atk. 364. E converso, great tithes do not lose their character in consequence of the limited extent of their cultivation; thus, wheat or corn sown in a garden or orchard does not lose its genuine and intrinsic quality, but continues a species of great tithes. Mosely 909.

being called to this subject, said, it was the thing grown and not the quantity which made the distinction (a). The word *gardens* must be liable to the same construction; it can have no meaning, except as to the particular matters grown in gardens; and under this endowment all matters grown there must be subject to pay tithes to the vicar, however extensive the cultivation may be. It is true, potatoes and turnips were not known at the time of the endowment; but there is no doubt that when they were known, they were first cultivated in gardens.

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But this is not all: the word *curtilage* is used, which is a word of more extensive comprehension, and means a portion of ground larger than a garden. In *Cowell* (b) *Curtilagium* is said to be derived from the French word *cour*, a court, and to mean a piece of ground lying near a dwelling-house, where they grow hemp, beans, and such like. There is also the word *alteragium*, which will carry small tithes of every description. It originally meant those things which were offered at the altar, but has been held of sufficient extent to carry every species of small tithes (c).

This construction of the endowment is also supported by the usage; an usage of fifty years is evidence of one for an anterior period. It appears by the admissions, that the tithes of hops have been paid to the vicar for upwards of fifty years, and there is no doubt that hops, at the time of the endowment, were equally unknown with potatoes, and were originally the subject of garden

(a) *Smith v. Wyatt*, 2 Atk. 364. and supported by usage, it will extend to small tithes, but not else. 2 Gwill. 629. *Reynolds v. Greene*, 4 Gwill. 1573.

(b) *Cowell's Interpreter*, tit. *Curtilage*.

(c) Where *alteragium* is mentioned in old endowments,

2 Bulstr. 27, S. C.

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cultivation; there is, besides, an admission of payments on account of the tithe of potatoes for many years back.

Mr. *Dauncey*, and Mr. *Newland*, for the defendant.— This is not the case of a vicar founding his claim on usage, but on an endowment. There is a difference where a vicar produces an endowment, and where he founds his claim on evidence supposing an endowment; an endowment may certainly be corrected by subsequent usage; but where one is produced, much more evidence is required to give a vicar tithes not mentioned in it, than where his right to all tithes rests only upon presumption. If a perception of tithes be founded in wrong, it will not give a title against a rector. There is no pretence to say that the tithes of potatoes and turnips are included in this endowment.

The words insisted on are *gardens* and *curtilages*; but it cannot be contended, that these words give the tithes of every thing which may be cultivated in them. To argue that potatoes, which were subsequently introduced, are liable to tithe under these words, because they were originally cultivated in gardens, is absurd.

The word *gardens* must be confined to local situation, and can mean only the *ancient gardens* that were subsisting at the time. Lord *Hardwicke's dictum* merely went to say, that the nature of things could not be changed because of the extent of cultivation. The endowment mentions apples. If the construction contended for be correct, they need not have been mentioned, as there is no doubt they were originally cultivated in gardens. As to the word *curtilage*, *Cowell*, it is said, states, that it is indicative of a court or place near the house, where hemp and beans are grown; then it cannot mean fields where other things are cultivated. The allusion to the word *alteragium* shews a distrust in the construction contended for

as to the other words. It has been said, this word will include all small tithes; but it cannot include *potatoes*, when at the time the custom to which it refers was in existence, potatoes were unknown in this country. It is clear the words of the endowment do not give the tithe of the articles contended for, and there is no usage to raise a presumption of a subsequent endowment. In order to give any tithe to the vicar, it must be shewn to be completely out of the rector by a clear right, or by undoubted usage founded on the acknowledgment of a right. In this case there is no perception against the rector, except as to potatoes and hops; and the payment of these by the occupier can never prejudice the rector, unless it be shewn to have been done with his privity. The probability is, the rector knew nothing about it. As to the tithe of hops, they were grown in places usually called *hop-gardens*, and therefore were liable to be paid under the endowment. With respect to the receipt of the tithe of potatoes, that can avail nothing, as it has only taken place since the plaintiff was vicar; and there is no evidence of the payment of the tithes of turnips, or any other species of tithes, or of any payment in lieu of them.

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Mr. *Martin*, in reply.—This is not a question on the endowment alone, but on the endowment as coupled with the usage. Endowments may be either enlarged or narrowed by subsequent usage (*a*). Up to the statute of *Elizabeth* (*b*), they might be modified according to the convenience of the parties.

(*a*) Where a vicar has used time out of mind, or for a long time, to take tithes or other profits, he will not be concluded by their not being expressed in the endowment of the vicarage; but it will be presumed, that the vicarage has, at some time or other, been augmented therewith. *Twiss v. Brazen Nose College*, 2 Gwill. 514. Hard. 328. S. C.

(*b*) 13 Eliz.

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We have here evidence of an uninterrupted usage for fifty years, and that is evidence of an anterior usage. With respect to the objection that the hops were grown in places usually called hop-gardens, that is absurd. Is this question to depend upon whether *J. S.* calls the place, where he grows his hops, a hop-garden, or a hop-ground?

It has been said, it does not appear that any tithe was paid of any other article; but the defendant ought to have shewn, that other articles have been grown. It is true, there is no evidence that potatoes were originally grown in gardens; but that is an historical fact, and a judge must be allowed to make use of his own historical knowledge.

LORD CHIEF BARON.

There must be a decree in this case for the plaintiff, since the defendant admits some articles to have been taken by him, respecting which there is no dispute. It is difficult, however, to give the vicar the particular articles contended for without resorting to a subsequent endowment. The grant of the tithe of gardens, certainly, cannot carry all things which may have been originally cultivated in gardens. The same observation applies to *alteragium* and *curtilage*. But whatever my opinion may be with respect to this endowment, I think there is enough, in the usage, to authorize the presumption of a subsequent endowment of all small tithes, and this will carry articles of modern introduction (*a*). There seems to have been a general perception of every description of small tithes by the vicar. If on a jury I should have felt bound to decide in favour of the vicar, and in this situation I am equally obliged to decide upon the

(*a*) Acc. Vide *Cunliffe*, Bart. also *Kennicott v. Watson*, *ibid.* v. *Taylor*, 2 Price, 329. Vide 250, in notis.

evidence before me: my doubt was, whether an issue should not be granted to the rectors; but I think I cannot grant it.

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Mr. *Dauncey* and Mr. *Newland* insisted on the right of the rectors to an issue, and cited *Garnons v. Barnard* (a).

LORD CHIEF BARON.

In *Garnons v. Barnard* he was occupier as well as rector; and a decree might therefore be made against him as occupier, which would have bound his rights as rector: but here I can make no decree at all against the improper rectors. The fact is, they ought not to have been parties, and the bill must be dismissed as against them.

Mr. *Wray*.—The occupiers were forced, by the claim of the rectors, to resist the demand; and we therefore made them parties.

LORD CHIEF BARON.

Let the bill be dismissed as against them without costs.

(a) 4 Gwill. 1462.

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*Westminster
Hall.
June 10th.*

Between WILLIAM HAMIL, DAVID ROBERTS,
THOMAS BROWN, and WARREN JANE,

PLAINTIFFS,

AND

THOMAS STOKES, JOHN BISS, SAMUEL
LONGMORE, BENJAMIN PRICE, THO-
MAS ROSSITER, and WILLIAM BAKER,

DEFENDANTS.

A. being an attorney pre-
vails upon *B.*
to enter into
partnership
with him for
the term of
five years, for
which he is to
pay 1050*l.* but
before four-
teen months
are expired
A. sues out a
commission
of bankrupt
against *B.*
which puts an
end to the
partnership.
Held a fraud
on the part of
A. and he is
decreed to re-
pay part of the
premium
which had al-
ready been ad-
vanced, and to
deliver up a
bond given by
B. for secur-
ing the re-
mainder (c).

IN *January* 1808, *Thomas Stokes* the defendant being in considerable business as an attorney at *Chepstow*, prevailed upon the plaintiff *Hamil* to enter into co-partnership with him for the term of five years, for which *Hamil* was to pay 1050*l.*

As *Hamil* had not at that time been admitted an attorney; it was arranged that the partnership should commence from the time of his admission, and that part only of the premium, viz. 500*l.*, should be paid immediately, and that the other part should be secured by the bond of *Hamil*, and of some responsible person as his surety. Articles of co-partnership to this effect were accordingly executed by the parties, upon which occasion *Hamil* paid down the 500*l.*, and he and the plaintiff *Roberts*, whom he had prevailed upon to become his surety, executed a bond for securing to *Stokes* the remaining 550*l.* to be paid by yearly instalments of 100*l.* each, with interest.

The articles were dated the 26th of *January* 1808; and on the 4th day of *May* following *Hamil* was admitted an attorney in the Courts at Westminster, from

which time the partnership between him and *Stokes* commenced.

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The first instalment of the 550*l.* secured by the bond, together with the interest, was paid when due; but on the 24th of *June* 1809, being about fourteen months from the commencement of the partnership, a commission of bankrupt was issued against *Hamil* at the instance of *Stokes* who was the petitioning creditor, under which *Hamil* was declared a bankrupt; and the plaintiffs *Thomas Brown*, and *Warren Jane*, were chosen assignees of his estate and effects.

The partnership between *Hamil* and *Stokes* being thus dissolved at the instance of *Stokes*, the assignees of *Hamil* insisted that as the consideration for which the 1050*l.* was to be paid to *Stokes* had failed, and that by the act of *Stokes* in suing out the commission, he had no right either to enforce the bond, or to retain the 500*l.*, and 100*l.* and interest already paid. They therefore, together with *Roberts* the surety, filed a bill against *Stokes*, and *Biss* and *Longmore*, who were his assignees under a commission of bankrupt which had been issued against him, and also against *Benjamin Price*, to whom the bond had been assigned, as a collateral security for some money due to him from *Stokes*; praying that the bond might be delivered up to be cancelled, and that they the assignees might be admitted to prove as creditors, under the commission against *Stokes* for the amount of the 500*l.* and 100*l.* and the interest already paid by *Hamil*.

An action had been commenced against *Hamil* by *Price* in *Stokes's* name to recover payment of the second instalment due on the bond, and which the bill also sought to restrain by injunction, for which purpose *Hamil's* name was used as a co-plaintiff.

The facts were all admitted by the answers as stated.

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After the original bill was filed, the defendants *Biss* and *Longmore* were removed from their situation of assignees, under *Stokes's* commission; and the defendants *Rossiter* and *Baker* were chosen in their stead, and were brought before the Court by a supplemental bill.

Mr. Dauncey and *Mr. Wyatt* for the plaintiffs. The question in this case is, whether *Stokes*, who has made *Hamil* a bankrupt, or *Price*, his assignee, can compel the payment of the remainder of the money secured by the bond, and also retain that which has been already paid?

Where the object of a bond has failed, the liability on that bond has ceased. Here the partnership which was the object of the bond was determined by the bankruptcy; and that having been effected by the interference of *Stokes*, the contract is at an end.

It is the constant habit in cases of apprenticeship, where the master is the person who breaks the contract, that the whole or part of the premium is returned. This is the case in the chamberlain's office; and the principle of it is, that where a person by his own act puts an end to a contract, it is not fair he should be allowed to insist upon the benefit of it. Had this remained a question between *Hamil* and *Stokes*, there could not have been a doubt respecting it. Then can the defendant *Price* be in a better situation? A bond being a chose in action is not assignable at law: if any action is brought upon it, it must be brought in the name of the obligee; and if there be any equity against the obligee, there is the same against the assignee; notice makes no difference.

Mr. Martin, and *Mr. Treslove*, for the defendants *Stokes*, *Biss*, and *Longmore*; *Mr. Beames*, for the de-

endants *Rossiter* and *Baker*; and *Mr. Joseph Martin*,
for the defendant *Price*.

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The dissolution of the partnership was occasioned by the conduct of *Hamil* himself in committing an act of bankruptcy, and not by *Stokes* in suing out the commission.

In order to establish the plaintiff's case, it ought to have been shewn that *Stokes* had some power to restrain *Hamil* from committing an act which would dissolve the contract, or that some fraud was resorted to on the part of *Stokes* to procure the commission. This is not like the case of an apprentice: in order to assimilate it to that, it ought to have been shewn that *Stokes* broke the contract. But here the act done was *Hamil's*; *Stokes* only took that advantage which he was authorized to take to save himself. It is like the case of two men attempting to save themselves from a shipwreck by means of one plank which is not large enough to preserve both; one has a right to push the other off to save himself. Here the credit of *Stokes* depended on *Hamil*; and if *Hamil* had sunk whilst the partnership existed, *Stokes* must also have perished. *Stokes* therefore had a right to push *Hamil* off for his own preservation.

Suppose it had been notorious that *Hamil* had committed an act of bankruptcy,—would any body say *Stokes* would have been justified in continuing the partnership? Can the circumstance of its not being notorious but in the knowledge of *Stokes* alone, make the difference contended for? Suppose he had committed a felony, and *Stokes* had prosecuted him,—could it be said that *Stokes* had put an end to the contract?

The only case on the subject of master and apprentice; is that of *Hall v. Webb* (a), and that is in favour of the

(a) 2 Bro. C. C. 78.

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principle now contended for. There the Master of the Rolls said; if the determination of the apprenticeship had been in consequence of the misconduct of the apprentice, it would have been a forfeiture of the premium. In this case, the determination of the contract was occasioned by the conduct of *Hamil* in committing an act of bankruptcy. There is another difficulty: the plaintiffs cannot be entitled to the whole money, because they have had the benefit of the partnership for fourteen months. Suppose the commission had been sued out a year only before the end of the term,—could it have been said, the whole money is to be returned, and the defendant allowed to retain whatever profits he may have made during the period in which the partnership continued to exist? There must be some apportionment;—and how is that to be made?

At all events the assignees are entitled to set off the amount of the debt upon which the commission was sued out against what they have to repay, and also to some allowance for the fourteen months during which the partnership lasted:

LORD CHIEF BARON.

If this had been a case merely between the plaintiffs and *Stokes*, no man could have entertained a doubt respecting it. Here is a man who, being an attorney, prevails upon another who is not an attorney to enter into an agreement that, when he is, he shall become a partner with him for five years; and for this he is to pay one thousand guineas. At the end of the thirteen months the partnership is determined, and the whole benefit of it lost to the plaintiff, and that by the act of *Stokes*, in suing out a commission of bankrupt against him. When *Stokes* admits that he procured a commission against *Hamil*, he admits that which no man of moral feeling

can hear without indignation. Courts of Equity would be a nuisance instead of a benefit, if they did not relieve a plaintiff from an engagement which the conduct of the defendant had determined.

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The assignees are right in endeavouring to procure what they can for the benefit of the estate: but they and Mr. Price are subject to the same equity as Stokes was liable to, and must therefore stand in the same situation. The injunction must be continued, and the bond delivered up to be cancelled. Refer it to the deputy remembrancer to inquire what ought to be paid to the assignees of *Hamil*, in respect of the 600*l.* and interest advanced by *Hamil* to *Stokes*. The assignees of *Stokes* must have the benefit of the debt, upon which he sued out the commission against *Hamil*, and also an allowance for the time during which the partnership continued; an enquiry should therefore be directed as to these points.

The costs must be in favour of the plaintiffs, except as to those of *Longmore* and *Biss*, *Stokes's* first assignees, who must have the costs from the time of their removal to the hearing.

Tuesday, the 10th day of June 1817.

It is ordered, adjudged, and decreed by the Court, that the defendant *Benjamin Price* do deliver up to the said plaintiffs to be cancelled the said bond bearing date the twenty-sixth day of January, one thousand eight hundred and eight, from plaintiffs *William Hamil* and *David Roberts* to the defendant *Thomas Stokes* for securing the sum of five hundred and fifty pounds and interest, and assigned by the said defendant *Thomas Stokes* to the said *Benjamin Price*, as in the pleadings of this cause mentioned. And it is further ordered that the injunction heretofore granted in this cause for staying the said defendants *Thomas Stokes* and

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Benjamin Price from proceeding at law against the said plaintiffs touching the said bond be, and the same is hereby continued till the further order of the Court to the contrary. And it is further ordered and decreed by the Court that it be, and it is hereby referred to *Abel Moysey, Esq.* the deputy to his Majesty's Remembrancer of this Court, to enquire and ascertain and state to the Court, how much of the sum of six hundred pounds paid by the said plaintiff *William Hamil* to the said defendant *Thomas Stokes*, as part of the premium or consideration for the said co-partnership between them in the pleadings mentioned, ought to be retained by the said defendant *Thomas Stokes*, in respect of the time that the said co-partnership subsisted; and let the sum of one hundred and eighty eight pounds six shillings and seven pence in the pleading mentioned, be added to what the said master shall find ought to be retained. And if the amount thereof shall not equal the said sum of six hundred pounds, then let the said plaintiffs *Thomas Brown* and *Warren Jans* prove the remainder under the commission against the said defendant *Thomas Stokes*: but if the amount thereof shall exceed the sum of six hundred pounds, then let the difference be proved by the said defendants *Rossiter* and *Baker* against the estate of the said plaintiff *William Hamil*. And it is hereby also referred to the said deputy remembrancer to tax the said plaintiffs their costs of this suit, and also the cost of defendants *John Biss* and *Samuel Longmore* from the time of their removal from being assignees of the estate and effects of the said defendant *Thomas Stokes* up to the hearing of this cause. And it is further ordered that such costs of the said defendants *John Biss* and *Samuel Longmore*, when so taxed, be paid to them by the said plaintiffs. And it is further ordered and decreed by the Court that the said plaintiffs do stand as creditors on the estate of the defendant *Thomas Stokes*, for the costs of the said plaintiffs so directed to be taxed as aforesaid, and for the costs of the defendants *John Biss* and *Samuel Longmore* so directed to be paid by the said plaintiffs to the

said defendant as aforesaid; *Jamin Price, Thomas Rossiter, and William Baker*, in respect to their defence of this suit.

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THE plaintiff in this case was entitled to the tithes of the parish of *Chorley*, in the county of *Lancaster*, under a lease from the rector; and filed this bill against the defendant, as occupier of a certain farm within the parish, called *Astley Hall* farm, for an account and payment of the tithes taken by him in the year 1810.

The defendant by his answer insisted that the plaintiff was not entitled to the tithes of any of the titheable matters which grew upon his said farm, or to any composition in lieu thereof, save the modus thereafter mentioned; because the said farm was parcel of the demesne lands of a certain mansion house called *Astley Hall*, situate in the parish of *Chorley*; and which demesne lands were usually called *Astley Hall* demesne, and comprised altogether about 219 acres, 2 roods, and 36 perches, statute measure; and that from time whereof memory of man was not to the contrary, a certain modus of 40s. per annum had been and then was payable to the rector of *Croston*, (of which parish of *Croston* the parish of *Chorley* formed part, until divided by an act of parliament mentioned in the bill,) by the proprietor of the said mansion house and demesne lands, for and in lieu, and in full satisfaction and discharge, of the tithes yearly arising thereupon, and had and taken from the whole of such demesne lands.

Although it is not necessary in an answer to set out the metes and bounds of lands claimed to be exempted by reason of a modus, yet they must be described in such a manner that it may appear with certainty what the lands are in request of which the exemption is claimed; and when the land in question is part of a larger portion, covered by a general modus, it is not sufficient to describe only the particular part, but the whole of the land over which the modus extends must be pointed out.

The case was first argued upon the question, Whether the modus was properly laid in the answer?

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Mr. *Martin* and Mr. *Roupell* for the plaintiff, objected, that the lands covered by the modus were not described with sufficient certainty, being merely described as lands belonging to a mansion house, without any metes and bounds being set out, which they contended ought to have been done on the authority of *Croft v. Ayer (a)*.

Another objection was, that it was laid to be payable by the proprietor, whereas it ought to have been payable by the occupier.

Mr. *Dauncey* and Mr. *Blake* for the defendant.—The description in the answer is sufficient; where a general name is given, that is a sufficient description: boundaries and buttals are only necessary to make that known which is not known before. The case of ancient orchards, which is in point, establishes the doctrine that, if a thing be given by a well-known name, that is sufficient: in this case they are described as demesne lands, which is a sufficient description.

It is not necessary to set out a modus so strictly in an answer, as in a bill. In the case of *Mallock v. Browne (b)*, the court helped the imperfect manner in which the modus was set out in the answer. The difficulty in *Croft v. Ayer* arose from there being three moduses. In *Vyse v. Duntze (c)*, it was treated on both sides as clear, that if the number of acres had been set out, the modus would have been well laid; the land there was merely called an estate. The case of *Ord v. Clarke (d)*, is exactly similar to this: there the modus was claimed in respect of divers parcels of land, containing about 61 acres, parcel of an ancient estate called R. estate consisting of 1500-acres co-

(a) 4 Gwill. 1325.

(c) 3 Gwill. 1124.

(b) 3 Gwill. 905. Amb.

(d) 4 Gwill. 1437.

vered by the *modus*; and the court thought the description sufficiently certain.

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With respect to the other objection, viz. that the *modus* is payable by the owner, and not by the occupier, the same point was raised in *Ord v. Clarke (a)*, and overruled. It is more advantageous to the parson to have the proprietor of the estate to look to for payment, as he is generally a more substantial man than the occupier.

Mr. *Martin*, in reply.—The word *demesne* is not a general name; it is only applicable to lands belonging to the crown or to a manor, and cannot be referable to those of a mansion. The *demesne* lands of the crown were those which were held by the crown in its own occupation, and were therefore frequently exempted from tithes; but if alienated, the exemption went. The appellation of *demesne* lands, as applied to a manor, means all the soil in the lord's occupation; but for a person, not claiming to be lord of a manor, to call lands in his occupation *demesne* lands, is a case of the first instance. To have rendered the description here complete, it should have been said that *Astley Hall* was a house belonging to a manor, and that the *demesne* lands of that manor were covered by a *modus*. We could then have understood why an agreement should be made with the lord of a manor for a *modus* payable by him, because he is supposed to be always in occupation; to speak of *demesne* lands is too vague, unless applied to lands belonging to the lord of a manor.

LORD CHIEF BARON.

I wish to hear the evidence: the defendant says he is not liable because of a *modus*, but cannot apply that *modus* to his particular farm, it being only part of a larger farm, to which his *modus* is applicable.

(a) *Ante*.

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The defendant's description of his own farm is sufficient; but with respect to the larger farm, my impression certainly is, that it is not sufficiently described.

Evidence was then read on the part of the defendants, to prove the payment of the modus in question, for upwards of 150 years; and that no tithes had ever been rendered on account of any part of Astley hall farm, except an allotment of common, called Heald meadow, which had been added to the farm about 40 years before, and which was generally supposed to be tithable.

LORD CHIEF BARON.

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As I understand this case, there is evidence sufficient to prove the payment of the modus; but there is a difficulty as to the manner in which the modus is pleaded, it being laid at 40s. a year, payable for the demesne lands of a certain house, of which the farm in question is part.

It appears to me that a modus being stated to be applicable to a general estate, and not to the particular farm in question, there ought to be some description of the estate to which it applies: if it had applied to the farm only, the description here would have been sufficient; but it is said to apply to the whole of Astley Hall demesne, without any metes and bounds being mentioned to shew what that demesne is.

Although it is not necessary in an answer to set out the metes and bounds of lands claimed to be exempted by reason of a modus (a), yet it is necessary to give such a

(a) The indulgence of courts of equity to the manner of stating a modus in an answer is carried to a great extent, all that they require being, that it should appear that the defendant has a good defence, and what the nature of it is. Vide *Atkyns v. Ld. Willoughby de Broke*, 4 Gwill. 1412. *Baker v. At-*

description as may shew what the particular lands are in respect of which the exemption is claimed.

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hill, 4 Gwill. 1423. 2 Anst. 491. In the latter of which cases the defendant insisted on a modus, without averring it to be immemorial, acknowledging he did not know how long it had existed, and omitting to state at what time it had been payable; and yet the Court held the answer to be sufficient: and so where a modus is set up in lieu of the tithe of gardens or orchards, it will be good, although the word *ancient* be not used. *Ragnall v. Wilks*, 2 Wood 144. *Roe v. The Bishop of Exeter*, Bunbury 57. *Blackburn v. Jepson*, 17 Vez. 477. *Prevost v. Bennett*, 2 Price 272. Neither is it necessary, in stating a modus of a certain sum per acre for any particular matter, to say, *and so in proportion for a greater or less quantity*. And though a defendant state that there are some lands in the parish upon which the modus does not attach, and do not particularly set forth what those lands are, it will be sufficiently well laid. *Gill v. Hooves*, 3 Gwill. 861. In *Mallock v. Browse*, supra, it was held, that if it appear that a pecuniary payment is made

for any species of tithe, although no particular tithe be specified, the court will help the imperfection in the manner of setting out the modus, and put a construction on the words; but then it must appear from the rest of the answer, to what species of tithe it refers. *Bourke v. Isaac*, 2 Price 301. For the same reasons superfluous words used in an answer, stating a modus which would make it indefinite, have been expunged. *Ellis v. Saul*, 4 Gwill. 1326. Anstr. 332. Vide also the case of *Wood v. Harrison*, Amb. 563. where a modus was laid for clover instead of hay, and yet was held sufficient; and the case of *Chapman v. Smith*, there cited, where an issue was directed, although an article was excepted out of the modus, which was not a species of the genus covered by the modus. Vide also the case of *Ord v. Clarke*, supra.

But notwithstanding the latitude thus allowed by the courts, it must be observed that, even in an answer, some degree of certainty is necessary, in order that the recitor may be apprized of the nature of the case he is to

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The defence here is not sufficient, because it shews a modus payable in respect of part of what does not suffice. Thus it must be stated *by* whom a modus is to be paid, in order to shew against whom the parson has a remedy for such a customary payment. *Cart v. Ball*, 1 Vez. 3. A defendant must also shew to whom it is to be paid. *Coggan v. Lord Lonsdale*, 4 Gwill. 1404. and for what tithes it is payable, *Nash v. Thorn*, 4 Gwill. 1324. *Bourke v. Isaac*, 2 Price 301. It was formerly held necessary, that the precise time of payment should be shewn, but that has since been departed from; but if the answer merely state that it is to be paid yearly: it will be too uncertain, *Cart v. Ball*, ante. What the particular lands covered by the modus are, must also appear from the answer with sufficient certainty. *Croft v. Ayer*, supra; and where the lands in question are part of a larger portion covered by a general modus, it is not sufficient to describe the particular part, but the whole of the land over which the modus extends must be pointed out, *Gillebrand v. Scotson*, (in the text). What the degree of certainty requisite is, may in a great measure be collected from what was said by the late Lord Chief Baron Macdonald, in giving the judgment of the Court of Exchequer, in a case something similar to the one in the text, where he says, "the defendant is not to lie by in his answer, and give a blind description which the plaintiff cannot meet; *there must be such a reasonable precision in the description, as would enable a sheriff to give possession of the closes. The issue is in general in the words of the answer, Wood v. Wray*, 4 Gwill. 1457. 3 Anst. 838. S. C. In the case of *Croft v. Ayer*, above-mentioned, the court appears to have been influenced in its decision against the moduses, from the difficulty of directing issues upon them.

A much greater degree of precision is however necessary, in stating a modus in a bill filed for the purpose of establishing it, than in an answer, where it is merely set up as a defence; and the court of Exchequer have carried this distinction so far, as to say, that though it was impossible to establish a modus, as laid in a cross bill, in consequence of the want of sufficient accuracy in describing the farms alleged to be covered by it; yet it was

ciently appear. It is foolish in the parties not to come to some compromise ; because, upon any other application by bill, an answer might be more perfectly drawn.

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a very different consideration whether the modus, as laid in the answer to the original bill, from which the statement in the cross bill was copied, might not afford such a defence as would prevent the plaintiff having a decree for account, *Scott v. Allgood*, 4 Gwill. 1369. *Atkyns v. Ld. Willoughby de Broke*, supra. The reason of this distinction appears to be because, where a landholder endeavours to establish a modus, he is bound to know what his claim is before he brings it into court, and is therefore tied down to an accurate statement of it: but in an answer, the tenant is bound within a limited time to shew whether he has any defence to make or not; and if he give such a statement as will inform the plaintiff of the general nature of the case to be brought against him, it will be sufficient, *Baker v. Athill*, supra.

But even in a bill, it is not necessary to be scrupulously strict in stating a modus; all that is required being a sufficient degree of accuracy to enable the rector to know

what the particular lands are in respect of which the exemption is claimed. Thus, although it is in general necessary to state in a bill the quantity and boundaries of lands, covered by the modus, as in the case of an ancient farm, *Scott v. Allgood*, supra; yet where there is such a description as will enable the party to ascertain what is intended by it, upon mere inspection, it will be sufficient, as in the case of *ancient orchards*, *ibid.*; or of *ancient parks*, 1 Ro. Abr. 665. And indeed it seems, that no precise form of words is necessary, if the meaning be clear without it. Thus where a farm was set out with all its parcels, the number of acres, and the abutments of each close, and it was averred that the modus had been immemorially paid for that farm, the Court overruled the objection that the farm was not alleged to be an ancient farm, and to have consisted immemorially of the same parcels, on the ground that the antiquity of the farm was necessarily implied by the allegation, that the modus had

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As the case at present stands I must decree an account, but without costs.

been immemorially paid for that farm, Lord *Stawell v. Atkins*, 4 Gwill. 1434. And in *Richards v. Evans*, 2 Gwill. 802. 1 Vez. 30. S. C. it was held that, in laying a *modus*, it is not necessary to make use of that express term, the material words being, *so much money paid in lieu and satisfaction of tithes*. It is now likewise esteemed sufficient, if the time of payment be laid to

be *on or about* a particular day, *ibid*; although it was formerly deemed necessary to lay and prove a particular day of payment, vide *Goddard v. Keble*, 2 Gwill. 631. and the cases there cited; and the court will establish a *modus*, even though proved to be payable on a day different from that alleged in the bill, *Anderton v. Davies*, 4 Gwill. 1260.

June 18, 23.

LEONARD v. FRANKLYN.

Book of endowment of *Hugo Wells*, Bishop of Lincoln, received as evidence.

THIS was a bill for tithes by the Vicar of *Newbottle cum Charlton* in the county of *Northampton*.

To prove the endowment of the vicarage the plaintiff's counsel offered in evidence an ancient book of endowments of *Hugo Wells*, Bishop of Lincoln, from the registry of the diocese of *Lincoln*.

Mr. *Temple*, for the defendant, objected to its being received as evidence on the ground of its having no marks or insignia of its being an official document, but purporting to be a collection made from other sources by a private compiler.

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At first, refused to receive the book; but on a subsequent day it was admitted on the authority of several decrees of this Court (a) produced by the plaintiff's counsel, in which it appeared to have been received.

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(a) *Halse v. Egerton*, 25 Jan. Jan. 1810. *Hebden v.*
1809. *Hansard v. Sims*, 25 Freeman, 1810.

RUMNEY v. BEALE—RUMNEY v. MORGAN
and Others.

Michaelmas
Term, 1817.

THIS was a bill for tithes by the rector of the parish of *Swindon*, in the county of *Gloucester*. Several moduses were set up by the answer; but the only one respecting which any question arose was laid in the following manner:—viz. "*For milch cows summered on lands within the said parish, a penny a cow in lieu of milk payable at Michaelmas or thereabouts in each year.*"

Modus of a penny a cow for milch cows summered on lands within a parish disallowed, because of the uncertainty of the word *summered*.

The defendants' counsel, in support of the modus, read two ancient terriers, which mentioned a payment of one penny per cow for milch cows during summer, and also the evidence of a witness which proved the payment to the rector of one penny for every cow depastured on his farm, which payment was usually made at Michaelmas.

Mr. *Dauncey* and Mr. *Wilbraham* for the plaintiff.

Mr. *Martin* and Mr. *Shadwell* for the defendants.

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This modus could not be sustained as laid, even if the evidence applied to it. It is laid thus: "for every milch

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cow summered on lands within the parish one penny a cow," which means, if a cow be summered you are to pay a penny, which is to exempt you for all the year round; if not summered, you are to pay the tithes.

As the modus is laid, the word *summered* is material; for, if a cow be not summered, the modus does not apply to it. What summering is does not appear; it may apply to some particular custom of the county. Does it mean tithe during the summer, or for the whole year? I do not understand what it means; and unless I understand it, I cannot send it to a Jury.

The reading of admissions from an answer in a tithe cause to prove occupation confined to that part which related to lands in defendants' occupation at the time of filing the bill, and plaintiffs not allowed to read that part which related to lands of which the defendant became subsequently possessed.

In this case another question arose on the following point:

The original bill was filed in *Hilary Term* 1811; but the defendant *Beale* died before he put in his answer, in consequence of which a bill of revivor and supplement was filed against his representatives, which prayed that they might answer the original bill. In so doing the defendants admitted the occupation by *Beale* of lands within the parish from the year 1807, from which time the account was prayed, to the time of his death; they also admitted that at *Lady day* 1811, since the filing of the bill, he entered into the occupation of certain other lands, in which he also continued until he died.

At the hearing of the cause the plaintiff's counsel offered to read the whole of this admission from the answer: but

Mr. *Martin* and Mr. *Shadwell*, for the defendants, objected that the plaintiff was entitled to read out of the answer that part only which related to the land occupied by defendant *Beale* prior to the filing of the bill, and which he continued to occupy to the time of his death;

and that the part which related to the land taken and occupied since the filing of the bill ought not to be read as evidence.

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Allowed the objection, and directed the reading of the answer to be confined to that part which related to the land, admitted to be in the defendants' occupation at the time of filing the bill.

MINOR CANONS OF *St. PAUL'S* v. *CRICKETT* Nov. 8, 17.
and Others.

THIS was a suit by the plaintiffs as the parsons and proprietors of the parish church of *St. Gregory* in the city of *London*, and their lessees, to establish their right to tithes at the rate of *2s. 9d.* in the pound under the stat. *37 Hen. VIII. c. 12.* in respect of a certain house within the parish, in the occupation of a person of the name of *John Crickett*, whose executors the defendants were. The point in difference was, whether the *2s. 9d.* in the pound was to be paid on the ancient reserved rent, or on the improved value of the premises.

Under the *37 Hen. VIII. c. 12.* the payment of a large fine, provided it be attended by no diminution of the accustomed rent, is not fraudulent or covinous within the statute; and the *2s. 9d.* in the pound will be decreed upon the rent only.

The house in question was held by testator *Crickett* from the year 1790, down to the year 1801, (when he purchased the freehold,) under a lease granted to him by the dean and chapter of the cathedral church of *St. Paul's* in the city of *London*, in consideration of his surrendering a former lease, and of a fine of *30*l.** under the yearly rent of *1*l.* 2*s.* 6*d.** instead of a capon which the defendants in their answer stated they believed was

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the only rent which *Crickett* ever paid for the premises. The defendants further stated their belief to be, that the fine of 30*l.* was the only other consideration paid to the dean and chapter for the premises, whilst he was their lessee, and that they had never heard that any other yearly rent was ever paid for that house, or for any other house or edifice which had at any time before been erected or stood on the site thereof. The defendants admitted the annual value of the house to be between 30*l.* and 40*l.*, and that variations had taken place in the amount of the fine.

A suit had, in the year 1795, been instituted in the Court of Chancery, by the present plaintiffs, against *Crickett*, for a similar purpose to the present (*a*), and on that occasion the bill was dismissed as against *Crickett*, with costs on his paying to the plaintiffs the 2*s.* 9*d.* in the pound on the reserved rent; the Court being of opinion that, as no fraud or covin was proved, he was only liable to that extent (*b*). After that decree, viz. in 1801, *Crickett* purchased the freehold of the premises in question, and did not afterwards pay the reserved rent, or any other, to the dean and chapter. No further material alteration had taken place in the circumstances of the case. The plaintiffs endeavoured to prove a variation in the payments made by former tenants in respect of their tithes, in order to shew, that they had not always been calculated upon the reserved rent, but were unsuccessful;

(*a*) *Canons of St. Paul's v. Crickett*, 2 *Vez. Jun.* 563. as sought an account, from the defendant, of the tithes covered

(*b*) The decree of the Court of Chancery on that occasion was pleaded in bar to the present suit; but the Court were of opinion that it could only be a bar to so much of the bill by it, and therefore overruled the plea as to so much of the bill as sought an account of the tithes for subsequent years. Wightwick 30

and the case therefore turned entirely upon the abstract question.

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Mr. *Wetherell* and Mr. *Hall* for the plaintiffs.

The question in this case is, whether the plaintiffs are or are not entitled to have their tithes of 2s. 9d. in the pound upon the rent, calculated upon the full annual value; and we contend that they are.

The act has received a judicial construction which amounts to this, viz. that, in the second clause, rent is a term used abstractedly from any letting, and means either actual rent, or estimated rent with reference to the value (a). The second clause of the act says "that the citizens and inhabitants of the said city of *London*, and the liberties of the same for the time being, shall yearly, without fraud or covin, for ever pay their tithes to the parsons, vicars, and curates, of the said city, and their successors for the time being, after the rate thereafter following, that is, to wit, for every 10s. rent by the year of all and every house, &c. within the said city and liberties of the same 16d., and for every 20s. rent by the year of all and every such house, &c. 2s. 9d., and so above the rent of 20s. by the year ascending from 10s. to 10s. according to the rate aforesaid." The word *rent* in the act evidently means *value*, and has been so construed.

It was formerly held by Sir *Edward Coke*, that where houses were not let, but remained in the occupation of the owner, nothing was to be paid (b); but now it is decided that, although a house be new built, and never let, the tithe must be calculated upon the full annual value, *Antrobus v. East India Company* (c). This construction shews that the statute, when it directs the payment of tithes to be calculated upon the rent, does not apply to any lease, but to rent calculated upon the estimated value.

(a) 13 Vez. 23.

(c) 13 Vez. 9.

(b) 2 Inst. 660.

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Then comes the third clause, which directs that, in cases where either a less rent is reserved than ought fairly to be reserved, or no rent is reserved on account of a fine being paid before hand; there we are to calculate the tithes according to the rent at which the houses were last let, without fraud or covin. This in other words means, that where it is unfairly let, by fraud or covin, we are to put the lease out of the question, and calculate upon the fair value. If any agreement be made between landlord and occupier to reduce the rent, by taking a fine, it is a fraud, with reference to the tithe owner; and we are to go to the estimated value. Here the landlord, instead of a fair rent, takes a fine, which is nothing more than anticipated rent: this is a fraud upon the tithe owner. Newly built houses are to pay at rack rent:—shall it be said then that, taking a large fine and little or no rent, is to prevent the tithe owner being paid according to the value? The court will consider such a transaction as fraudulent and covinous, and will direct the tithe to be paid according to the value. The decision of Lord *Rosslyn*, when this cause was formerly before the court (a), was given hastily, and without the subject being discussed. The case was not argued upon that point, but upon the jurisdiction of the Lord Mayor. If that decision should be allowed to prevail, it would let in much unfairness towards the church. As to the decision in *Gwillim*, *Dunn v. Burrell* (b), it is to be recollected, that the case occurred at a time when the law on this subject was very little understood; it was then held that where a man was in possession of his own, he should pay no rent. Then also the question, as to what was meant by the last reserved rent, was undecided; all these points have been subsequently settled. In *Antrobus v. The East India Company* (c), it has been held that, where a man is in the occupation of his own estate, he shall pay tithe according to the value. But why is a person occupying his own to pay at a rack rent,

(a) *Canons of St. Paul's v.**Crickett*, ante.

(b) 1 Gwill. 299.

(c) Ante.

when a person occupying under an old lease, at a nominal rent merely, but paying a large fine, is to pay only upon the nominal rent? The fine ought to be considered as anticipated rent: at all events, the defendant ought to have proved that the fine, as well as the rent, has always been the same. But here it is admitted, that the fine has been varied; so that the anticipated rent may have been increasing, whilst the reserved rent continued the same.

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Mr. *Agar* and Mr. *Shadwell*, for the defendants.—The questions to be decided in this case are whether, upon the statute, the plaintiffs are entitled to have a greater payment than 2s. 9d. in the pound, upon the ancient reserved rent? and whether, if it shall turn out that there has been an increase of fine, that is to be taken as an item to increase the rent? To decide these points, it is only necessary to refer to the statute. No case has been cited by the plaintiffs, which is at all in their favour. The decision in *Dunn v. Burrell* (a) is a decision for the defendants, since it shews that the fine is not to be taken as liquidated rent. The statute has defined two cases, in which the lease is to be put out of the question, and the tithe calculated upon the value, i. e. where a lease is made by fraud or covin, reserving less rent than has been accustomed, or where one is made without any rent reserved, by reason of any fine or income, paid before hand, or by any other fraud or covin. In these cases the tithes are to be calculated upon the last reserved rent: the court cannot go beyond what the statute has pointed out. It is quite clear from the terms of the act, that the attention of the Legislature was drawn to the possibility of fraud, and must therefore have taken into consideration cases in which the fine might be increased, and the rent continue the same: but it has confined its enactment to the two cases before specified. Can the Court then, finding the statute directed to

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two specified cases, and silent as to cases extremely likely to arise, say that it meant to include those cases? It is evident the statute was intended to continue the income of the clergy according to the rents, and not according to any fine which might at any future period be taken. Its object was not merely to define the quantum, but the mode of computing the tithe; and it has therefore expressly referred to the case of rent. There is no allusion to any other mode of calculation, except in the third section, which relates only to those cases where there has been fraud or covin. In the city of *London*, it was the custom for ecclesiastical bodies to let leases upon certain rents with fines; and the statute never meant to interfere with that custom, but merely directed that the payment should be made upon the accustomed rent. That this is the accustomed rent is evident from the fact, of this being a lease by an ecclesiastical body, since ecclesiastical bodies are restrained by the 13 *Elix.* from granting leases, unless for twenty-one years, and at the rent before reserved. In addition to this argument, there are several positive decisions in favour of the defendants, and there are none in favour of the plaintiffs. The decisions in *Skidmore v. Bell* (a), and in *Canons of St. Paul's v. Crickett* (b), are in point for the defendants. As to the circumstance in the last-mentioned case of the point not having been argued, it can be considered in no other light, than as an abandonment of the case on the part of the Minor Canons. With respect to the case of *Antrobus v. The East India Company*, which has been relied on by the plaintiffs, that arises upon the construction of a different clause of the act, and is entirely beside the present question.

Mr. *Wetherell* in reply.—The decision in *Skidmore v. Bell* cannot be relied upon, since in that case propositions are stated which are not law, as in the instance of new built houses, where the determination there has been

(a) 2 Inst. 659.

(b) Ante.

overturned by *Antrobus v. The East India Company (a)*. If I make out a case where the fine has been raised, it is the same as if I had made out a case where the rent has been raised. If parties will enlarge the premium, without augmenting the rent, it cannot be said to be a letting without fraud or covin. The statute meant to say, if you go on with the old rent and premium, there can be no fraud; but if you increase either, it is otherwise. Suppose that, in a case where no premium or fine had ever been received, a fine were to be taken, that would certainly be a fraud: if so, why does not the same argument apply where you increase the sum? The consequence *quoad* the clergyman is the same. It cannot be said that a house is let without fraud or covin, with respect to the clergyman, if you go on increasing the fine.

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According to my understanding of the act, the intention of the Legislature was to charge property at its full value, and they therefore took the rent as a fair means of deciding that value; and if the point were new, I should be inclined to say, that if, at the time of the statute, a landlord let his house at a small rent, and had ever since continued to let it at the same rent, the statute would certainly protect the tenant from paying tithe upon any thing but such ancient reserved rent: but that if he take a larger fine, that certainly is another way of taking a rent. But I must be governed by the act of parliament, and the cases which have been decided upon it, and will look into them: I shall have great reluctance in saying that an increase of fine is not to be considered as an increase of rent.

LORD CHIEF BARON.

This is a bill by the Minor Canons of *St. Paul's* against a person of the name of *Crickett*, originally an occupier
(a) Ante.

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of a house in the parish of *St. Gregory*. When he died, his executors were made defendants.

The Minor Canons claim under the *37 Henry VIII.*, upon the construction of which act much has been said, in many cases, which have occurred in late years : but though many decisions have been made, there are none, except the one in *Vexey, jun. (a)*, which apply precisely to the present case (*b*).

(*a*) *Canons of St. Paul's v. Crickett*, ante.

(*b*) From the various decisions which occur the following points may be collected, as to the payment of tithes under the stat. *37 Hen. VIII. c. 12.*

1. The reservation of a large fine, provided it be attended with no diminution of the accustomed rent, is not fraudulent or covinous within the meaning of the statute. *Skidmore v. Bell*, 2 Inst. 659. *Canons of St. Paul's v. Crickett*, 2 Vez. Jun. 563. *Minor Canons v. Crickett*, supra. Nor will it be considered as rent, even though the fine be in the nature of an income, payable at the same times as the reserved rent, *Dunn v. Burrell*, 1 Gwil. 299. *Minor Canons v. Crickett*, supra.

2. If a defendant state in his answer what the rent is under which he holds, and deny that any greater rent has ever been paid, it will rest

upon the plaintiff to shew by evidence that a greater rent has been paid. *Canons of St. Paul's v. Crickett*, ante. *Minor Canons v. Crickett*, supra.

3. Where the rent has been increased, the tithes are to be paid upon the improved rent, *Skidmore v. Bell*, ante. *Sheffield v. Pierce*, 2 Gwil. 503. but a reservation of rent by a tenant for life, who lets for years, will not bind the reversioner to pay tithes according to such reservation, *Meadhouse v. Taylor*, Noy. 130. 1 Gwil. 329. in notis S. C.

4. Rent for half a year, and afterwards for another half year, is a yearly rent, within the meaning of the decree, *ibid.*

5. Although the statute directs that where no rent, or a less rent, is reserved, *by reason of any fine or income paid before hand*, the tithes are to be calculated upon the last rent : the payment of a fine or in-

The defendants state, that *Crickett* had a lease from the dean and chapter of *St. Paul's*, at the rent of 1*l.* 2*s.* 6*d.* per annum; and that he also paid a fine on

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come is not material; and if the rent be diminished, the statute will apply, although no fine or income be paid, *Skidmore v. Bell*, ante.

6. The expression in the third sect. "as the same was last let," is not to be understood as meaning last before the decree mentioned in the statute, but last before the demand for tithes, *Meadhouse v. Taylor*, ante.

7. All houses are chargeable, except those as to which there is a special clause of exemption in the statute, *Green v. Piper*, Cro. Eliz. 276. and where there is no rent to refer to, the occupier is to pay according to the value, 13 Vez. 23. Thus where houses are in the occupation of the owner, and have never been let, the tithe is to be paid upon the value, *Grant v. Canon*, 2 Gwil. 541. *Antrobus v. The East India Company*, 13 Vez. 9. Although from a dictum of Sir *Edward Coke*, the contrary opinion appears formerly to have been entertained, 2 Inst. 660. And where new houses are built upon the site of old buildings, and continue in the

occupation of the owner, the tithe is to be estimated upon the value, and not upon the rent, of the old buildings upon the site of which they are erected, *Antrobus v. The East India Company*, ante. Even if the new house be erected on the site of a shed, or other buildings which before paid no tithe, it is liable under the statute, *Ioatt v. Warren*, 3 Gwil. 1054. *Bramston v. Heron*, 4 Gwil. 1314. But where new houses are erected on the site of houses or buildings in respect of which there was a customary payment in lieu of tithes, the court will decree the customary payment only, *Williamson v. Gosling*, 3 Gwil. 902. *Bramston v. Heron*, ante.

8. Under the 18th section, which directs that, "where a less sum than those directed by the act hath been accustomed to be paid for tithes, the payment shall be after such rate as hath been accustomed." An individual house may be protected, although the payment be not general through the parish, provided the owner or occupier can prove a customary payment,

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renewal; and the question is, whether this fine can be connected with the reservation of rent.

This question, according to the cases, turns upon the definition given to the word *rent* in the act of parliament.

It has been decided that this word, in some parts of the statute, means value; but I do not think that such a construction can be given to it in the present case. Upon looking to the second clause of the act, we find that it directs the 2s. 9d. to be paid on every twenty shillings rent by

Warden and Minor Canons of St. Paul's v. Kettle, 2 Vez. and Bea. 1. It is not necessary that such customary payment should be set up as a modus; and the court will grant an issue to try whether a less sum than 2s. 9d. in the pound ever has been paid, although there be no regular proof of a modus, *Bennett v. Trepass*, 2 Gwil. 633. It is not however a sufficient answer to the claim of 2s. 9d. in the pound under the statute, to allege merely that the plaintiffs have never received the 2s. 9d.; but it is necessary for the person setting up such customary payment, to state what such payment is, specifying the precise sum, *Warden and Minor Canons of St. Paul's v. Morris*, 9 Vez. 155. *Antrobus v. The East India Company*,

ante; and that he is the occupier of the premises to which it applies, *Warden and Minor Canons v. Kettle*, ante. And if he prove a different sum from that laid in the pleadings, there must be a decree against him, as in the ordinary case, vide *Warden and Minor Canons of St. Paul's v. Morris*, ante. But it is not necessary that the customary payment insisted on should be immemorial, although it is not decided how far back it ought to be carried, 9 Vez. 165. It seems, however, that if the payment have been usually during such time as would have enabled it to acquire, in the ecclesiastical courts, the character of a customary payment, the statute will operate upon it, *Warden and Minor Canons v. Kettle*, ante.

the year; and then follows the third clause, which enacts, that if a less rent be reserved by fraud or covin, the tenant is to pay upon the rent at which the premises were last letten. The word rent, as here used, can mean only rent reserved, and not value.

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But it is said, that in this case we are to consider the fine as tantamount to rent; and certainly the payment of a sum of money by way of fine may metaphorically be considered as anticipated rent. But then we have the case of *Dunn v. Burrell* (a), which is decidedly against such an interpretation. That case was argued by Serjt. *More*, Sir *Henry Finch*, and others, whom we all know to have been considerable men. There likewise the payment was not properly a fine, but a large sum payable at the same time as the rent. The Lord Keeper at first doubted whether this imitative rent was rent within the meaning of the act: but the case was afterwards argued before a special commission, consisting, amongst others, of Sir *Francis Bacon*, Sir *Henry Montagu*, Sir *Henry Hobart*, and other lawyers of great eminence; when it was determined, that the payment of the 25*l.* per annum was not rent. I feel myself therefore bound by this decision, to consider the payment at present in question not as rent.

Then the act says, that where a lease is made by fraud or covin, reserving a less rent than has been accustomed or without rent, the tenant is to pay according to the quality of the rent at which the premises were last let, without fraud or covin. Here what Mr. *Crickett* paid was a rent of only 1*l.* 2*s.* 6*d.*,—but was it a less rent than had been accustomed? and if it were, was it reserved by fraud or covin, or without fraud or covin, there might have been a less rent. It is stated in the answer that the rent has been always the same; and this is an

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ecclesiastical rent which we know must have been the same ever since the 13th. Eliz. : the probability is, that it was the same before the time of the statute. Here then is a rent, which in all probability has continued the same from the time of Henry the 8th to the present hour. How can I say that this lease has been made by fraud or covin? If you mean to charge fraud, you ought to prove it; at least you ought to shew that this transaction has recently taken place, that there was originally a large rent, and that a smaller one has been subsequently taken.

If this case had stood on the authority of *Dunn v. Burrell* alone, I should have felt myself bound to decide for the defendants: but when I look at the case in *Vesey (a)*, which is a case under nearly the same circumstances, and between the same parties, I cannot entertain a doubt.

That bill was filed, as this is, to establish the right to tithes, in respect of the houses of the defendant at the rate of 2s. 9d. in the pound. It is material to observe that in that case there were two defendants, and that they stated their defences in a different manner. The defendant *Crickett* alleged, in his answer, that he had never heard of any greater rent being paid than the one in question: but the other defendant made no such allegation. The *Attorney* and *Solicitor General* at the time, who argued the case on behalf of the plaintiffs, were persons not very likely to give up points which they thought they could maintain: but they felt themselves obliged to admit that, if an antient customary payment were made out, the tithes were to be paid accordingly; and merely insisted that, upon *Crickett's* answer, the plaintiffs were entitled to an enquiry whether the rent reserved by the last lease was the rent the premises were let for without covin previously to that lease. I cannot help considering this as an abandonment of the point. The Lord Chan-

(a) *Canons of St. Paul's v. Crickett*, ante.

tellor in giving judgment said, "as to *Crickett* he has stated the lease under which he holds, the rent he paid, and what he could not put in issue, because it is negative, that he never heard of any greater rent being paid. There is no sort of evidence of any other having been paid from the earliest period, and there is not a colour of fraud or covin;" and upon this ground his lordship dismissed the bill, as against him, with costs, upon *Crickett's* agreeing to pay the plaintiffs what was due for his tithes, calculating it upon the ancient rent. That case is precisely in point with the present.

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I have endeavoured to point out the meaning of the act of parliament as applied to this case, and find myself supported by these decisions. The bill must be dismissed with costs.

Bill dismissed with costs.

WILLIAMSON, Clerk, v. Lord LONSDALE and Others.

Nov. 11. 12.
13. 17. 19.
Feb. 14, 1818.

THIS bill was filed by the plaintiff as vicar of the parish of *Kirkby Stephen* in the county of *Westmoreland* for the tithes of turnips, potatoes, and agistment. The defendants set up, by their answer, two parochial moduses in lieu of the tithe of turnips and potatoes, and three district moduses to cover the tithe of agistment in different townships within the parish.

A modus of one penny for every occupier of land in tillage in lieu of all predial tithes grown upon such lands is bad.

Although the tithe of agistment is of recent in-

The first modus set up was a parochial modus of one introduction, especially in the North of *England*, a modus of a certain sum of money in lieu of tithe of grass, whether mown or made into hay, or eaten by barren and unprofitable cattle, will cover the tithe of agistment.

Potatoes and turnips consumed in the family of the grower are liable to tithe.

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penny payable at *Martinmas* by every owner of a garden or garth, within the parish, commonly called a garth penny, for or in lieu of the tithes of all titheable matters arising in every such garden or garth, which they insisted covered the tithes of potatoes and turnips grown in gardens or garths. This *modus* was not disputed.

The second *modus* was laid as follows: "And all the defendants insist and hope to be able to prove that, from time whereof the memory of man is not to the contrary, there hath been and now is due and payable to the vicars of the said parish of *Kirkby Stephen* for the time being, their lessee or farmer, lessees or farmers, by the several and respective occupiers of lands in tillage within the said parish of *Kirkby Stephen*, or the titheable places thereof, the *modus* or yearly sum of one penny, commonly called a plough penny, for and in lieu and satisfaction of all small predial tithes arising, growing, renewing, or increasing upon lands, so in tillage; which said *modus* or yearly sum of one penny hath been, and is due, and payable at *Martinmas*, in each year, or as soon after as demanded." This *modus*, the defendants insisted, covered the tithes of potatoes and turnips grown in fields or upon lands in tillage.

Some of the defendants also stated that all the turnips and potatoes grown in their respective fields, or lands in tillage, were grown for the use and consumption of themselves and their families, and were so used and consumed accordingly; and insisted that they were not liable to pay tithes for those articles so used and consumed.

The other *moduses* set up by the answer were district *moduses*, and related solely to the tithe of agistment. The first extended over the township of *Winton*, and was laid as follows: "And the defendant *Matthew Robinson* insists, and hopes to be able to prove that there is now and from

time whereof the memory of man is not to the contrary, hath been a custom that all the occupiers of land in the said township, or some or one of them on behalf of all of them unanimously, have been used and accustomed, and of right ought to pay to or for the use of the vicar of the said parish of *Kirkby Stephen* for the time being, his lessee or farmer, yearly on Easter Monday, or as soon after as demanded, the sum of 15*s.* in lieu and full satisfaction for the tithes of all grass, growing on lands within the same township, whether the same be mown or made into hay, or eaten by barren and unprofitable cattle;" and the defendants insisted that the agistment or feeding of sheep after shearing time, and removed before the next shearing time, was covered by this modus.

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The other two district moduses applied to the townships of *Hartly* and *Naitby*, viz. 8*s.* 2*d.* for the township of *Hartly*, and 3*s.* 6½*d.* for the township of *Naitby*, and were both laid nearly in the same manner.

The evidence on the part of the plaintiff established his general title as vicar to all tithes, except those of corn and grain. The only questions, therefore, were, whether the moduses set up were sufficiently established in law and fact to authorize their being sent to an issue; and whether the defendants were liable to pay tithes for the potatoes and turnips consumed in their families.

Depositions were read on the part of the defendants, which went to prove that a certain modus, called the plough penny, was due and payable to the vicar by the occupiers of lands within the parish in lieu and satisfaction of green crops, and every thing produced by the plough upon the said lands, or raised from land under tillage, except corn and grain, whether such lands should or should not be ploughed, or in cultivation; and that such modus was payable in the first whole week after the

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23d of *November* in each year. It also appeared that no composition or tithe in kind had, within living memory, been paid for the tithes of turnips and potatoes grown within the parish.

The depositions on the part of the defendants further proved the payment of the several sums mentioned in the answer to be payable in respect of the townships of *Winton*, *Hartly*, and *Nailby*; and that such payments were reputed to be made in lieu of the tithes of grass, whether mown, made into hay, or eaten by barren and unprofitable cattle. That the occupiers of cattlegates, and other lands within the townships, contributed towards such payments respectively; and that no tithe, in kind or composition, had within living memory been paid to the vicar either for hay, or agistment, or for grass, whether mown, or eaten by barren cattle.

The payment of the district moduses was not denied by the plaintiff; but he contended that they covered the tithe of hay only, and did not extend to agistment; and in support of this there were produced, on his behalf, the books of the tithe collectors, for many years preceding his induction, in which these payments were entered expressly as payments in lieu of the tithe of hay.

Mr. *Dauncey* and Mr. *Hall* for the plaintiff.—This is a bill by the vicar for three species of tithes, viz. turnips, potatoes, and agistment. We have proved distinctly, that the tithes in question are out of the rector, and that the rector is only entitled to the tithes of corn and grain. This is *primâ facie* evidence of the title of the vicar to all tithe except corn and grain. Then comes the defence of the occupiers. In the first place, it is contended that potatoes and turnips, when consumed in a family, pay no tithes; but this is an obsolete doctrine. There is no modern decision to this extent; the only decisions which are

found are very ancient, and relate to very small articles. In many places, all the articles grown are consumed in the grower's family. As to the moduses, they are set up in a very extraordinary way: the first is the plough penny, the garth penny not being disputed. This is said to be a modus for small predial tithes, arising upon lands in tillage, and is laid thus:—The defendants *insist, and hope to be able to prove*, that a modus of one penny is payable by every occupier of land in tillage, for the predial tithes of all land in tillage. This is not the ordinary way of introducing a modus. They do not venture to swear, either to their knowledge or belief, that such a payment exists, but hope they may be able to produce other people that will.

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It is true the answer states a payment, but it is a payment which relates to a totally different subject. As the modus is laid, every person pays the plough penny, whether he has the article or not; this brings it within the description given of a plough penny in *Cowel*(a), who says, it is an eleemosynary payment to the church, by persons having a plough land, without reference to any particular article. Here it is paid, without reference to any particular article: but, because it refers to no particular article, the defendants say, We will give it a character, and refer it to something.

The modus is besides unreasonable, uncertain, and variable; it is what has been termed a dancing modus. It does not depend upon the quantity of land by which it is covered, but on the number of occupiers: so that, if there be but one occupier, the vicar is to receive only one penny; but, if the occupation be divided, the penny will receive a co-extensive multiplication. It never can be supposed that a vicar would come to so uncertain an

(a) Cowel's Interpreter, Tit. Plough Penny.

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agreement. In *Turton v. Clayton* (a), the payment of a penny for hay was, upon these grounds, held unreasonable. In a case before the Master of the Rolls, *Blackburn v. Jepson* (b), the modus was laid at 4d., paid by each occupier having lands cultivated by the plough, by three or more horses, usually called a plough land, and 2d. by each occupier having any such land cultivated by fewer than three horses, usually called half a plough. There was no difficulty in that case in knowing what a plough was: a plough land was described as so much land as was cultivated by three horses, and half a plough so much as was usually cultivated by one or two horses. This might easily have been ascertained, and yet the Master of the Rolls thought it was not sufficient.

Independently of these objections, the modus is not proved as laid; if the proof do not conform to the allegation, it will not support it: a modus must be well pleaded, and proved as pleaded, *Bishop v. Chichester* (c), *Warden and Minor Canons of St. Paul's v. Morris* (d), *Scott v. Fenwick* (e). In this case the modus is restricted, and the evidence general. In the answer the modus is restricted to all the occupiers of land in tillage, in respect of land in tillage; but the evidence proves that all the occupiers have universally paid, without reference to the nature of their land, or to the articles grown upon it.

With respect to the agistment modus, it is merely a payment for the tithe of hay, and cannot extend to agistment, which was for a long time unknown in the

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|---|-------------------------------|
| (a) 2 Gwill. 628. Bunb. 80. | still pending before the Lord |
| (b) 17 Vez. 473. The decision of the Master of the Rolls in this case has been appealed from; and the appeal is | Chancellor. |
| | (c) 4 Gwil. 1316. |
| | (d) 9 Vez. 164. |
| | (e) 2 Gwil. 1252. |

north of England, and has been only introduced of late years into that part of the country. It is true we cannot shew that any payment of agistment tithes has been made in this place : but as this is evidently a payment made for hay only, how can the defendants refer it to an article for which it was never paid ?

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Mr. Fonblanque, Mr. Martin, and Mr. Spranger, for the defendants.—Two objections have been made to the modus of a plough penny; one, as to the manner in which it has been pleaded, the other as to its legality. With respect to the first objection, viz. that it has been pleaded without any positive oath, the answer is, If you had wanted the defendant's belief as to its existence, you ought to have excepted to the answer; but having omitted to do that, you cannot raise the objection now. With respect to its legality, none of the objections which have been made to it apply. Though there is a fluctuation in the modus, as it is described; yet that is not peculiar to this sort of case. In *Blackburn v. Jepson (a)*, the difficulty arose from the manner in which the payment was stated, there being no averment as to what the quantity of the land was, so that the judge was left to speculate upon what number of acres three or two horses could cultivate: but that objection does not attach to the present case, as there is no reference to quantity. Whether the land be more or less, the payment is the same; the vicar is entitled to a certain sum from every occupier of land in tillage, without any difficulty in ascertaining the quantity of it. It is said, it is not probable this agreement could have been entered into by any clergyman, because all the land might have been occupied by one person: but the case of *Bennett v. Read (b)*, which was cited in that of *Blackburn v. Jepson (c)*, affords an

(a) Ante.

(c) Ante.

(b) 4 Gwil. 1272.

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answer to this objection. The circumstances of that case were nearly similar to the present: the objection urged was, that the houses for which the modus was laid to be payable might be reduced to one which was supposed to be so violently unreasonable, that no such agreement could have been made. But Lord Chief Baron *Eyre*, in delivering the judgment of the court, said, "The answer given at the bar to this objection is the true one. The recompence is certain to a common reasonable intent, and more is not required; these are Lord *Hardwicke's* words in *Hardcastle v. Smithson* (a). The possible reduction of the number of inhabitants, householders, is too remote a consideration." Were there any of the objections made to the modus in that case, which are not applicable to this? The modus there was established.

Another point is made by the answer, viz. as to potatoes and turnips consumed in the family: the defendants contend they are not liable to tithe. If they are right as to the plough penny, this is not material; but otherwise it is of importance.

The case put on the part of the plaintiff seems to warrant the conclusion, that articles *ejusdem generis* come under the exemption; and for this reason, where articles are of a modern introduction, the courts say that the clergyman is entitled to the tithe of them, because he already is entitled to the tithe of articles *ejusdem generis*. Green peas gathered for the use of the family are, we all know, exempted from tithe (b). Why should not other articles, which are used for the like purpose, be the subject of a similar exemption. That this distinction is carried further than the instance of green peas, is evident from the decisions of many other cases in *Rolle's Abridgment*, where parties have declared in prohibition. It is

(a) 2 Atk. 246.

(b) 1 Rol. Abr. 647.

there said, that if a man feed sheep on his land, and afterwards kill and eat them in his house within the parish, he shall pay no tithe (c).

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[LORD CHIEF BARON. I apprehend that is not law. Suppose a man buy oxen, can it make any difference whether he consumes them in a family, or sells them to a butcher? Why should there be any distinction with respect to sheep.]

With respect to the tithe of agistment, it cannot be denied that the demand of this species of tithe is of very recent date; at least, in the part of the kingdom where this parish lies: but the answer here given to the claim is sufficient to dispose of it. It is not contended that there is a modus covering this particular article; the modus set up is for all the grass, whether made into hay or eaten; and this is a mere question of fact, and must depend upon the evidence. What is there in this agreement which can induce the court to doubt that it might have been entered into between the parties? It is said that this modus was a new invention; but this is not a modus for agistment, but for the tithe of grass. There is nothing in it which is either illegal or uncertain; and the evidence proves negatively that nothing has been demanded but this payment. If then this be neither illegal nor uncertain, and it be proved that nothing else has been demanded, can the court say this is not such an agreement as the parties would enter into? As to the collector's books, they are certainly evidence. But suppose these entries had stood as grass tithe, would the occupiers have said they were bound by them? Is the defendant's case then to be destroyed, because the collector chuses to enter this as a tithe payment for hay? And besides, if this had been considered as applicable to hay only, would he not have demanded something more? Although it be true, as has

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been said, that tithe of agistment is new ; yet it is to be recollected, that the case in which it was so said occurred above forty years ago, since which time the vicar cannot be said to have been ignorant of his right ; yet no instance occurs of a demand having been made for any other payment than the moduses in question.

If this had been a hay modus, as contended, it would have been paid only by those who mowed their land : but persons having cattle gates and pasture land contributed equally, which proves that these persons considered themselves as equally liable.

Mr. *Dauncey* in reply.—Assuming the general right of the vicar to be established, the questions remaining for decision are, whether the moduses set up are legal ; and if so, whether they are proved satisfactorily.

With respect to the plough penny, it is badly pleaded, illegal as stated, and not supported by the evidence. The usual mode of laying a modus is for the defendant to state it according to the best of his knowledge, recollection, and belief, in order that we may have the belief of the defendant before the court : but here they do not venture to say they know or believe it, but call upon the court to believe it.

It is no objection at the hearing to the manner of stating a modus in an answer that the defendant does not speak to his knowledge and belief. If the answer be not sufficient, it should be excepted to.

[**LORD CHIEF BARON.** I think the modus is in this respect sufficiently laid to support the evidence. If you had wanted the defendant's belief, you should have excepted ; it is too late to take the objection now.]

The payment set up is not applicable to the case made here. It is a mere eleemosynary payment by persons occupying plough lands ; but the defendants take it out of the ordinary course, and apply it in the manner here mentioned. We object to it, because it is perfectly un-

reasonable and uncertain. It never can be supposed that a parson entitled to tithes in kind, should consent to take one penny only from each occupier, so that if the number of occupiers were to be reduced to one, the vicar would be entitled to one penny; and in this manner one person might get all the land into his occupation, and yet only pay one penny. The reasoning in *Bennett v. Read* (a), does not at all convince my mind that the payment there was unreasonable. That in *Travis v. Oxtou* (b), is much more satisfactory. The report of that case is very simple, short, and intelligible; and very different from the other. That case is very much like the present; but *Blackburn v. Jepson* (c) is more like our case. In that case the one of *Bennett v. Read* was before the court, and it was a question as to a plough land. The language was 4d. for each land cultivated by the plough; upon that case the decision of the court was, that the objection for want of certainty could not be got over, and that the modus was bad. If that authority be entitled to any weight, it must decide the present case. The word plough here is treated as if it had some definite meaning; but there it is said not to have a sufficiently definite meaning.

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But besides this, there is another radical defect in the plaintiff's case: to entitle a party to an issue, it is not only necessary to be well laid, but it must be proved as laid. In laying a modus you must state by whom and for what it is to be paid, and if your proof do not establish your statement, or vary from it, the modus will not be good. It is stated, that it is paid by the occupiers of lands in tillage; but the proof is, that it is paid by every person who occupies lands, whether in tillage or not. This is most material; for the records would hand it down to posterity, as a modus payable by the occupiers of lands in

(a) Ante.

(b) 3 Gwil. 1066.

(c) Ante.

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tillage, when in fact it is payable by the occupiers of lands of every description. If the evidence fail either in shewing by whom or for what a modus is paid, it fails *in toto*.

It has been urged, that turnips and potatoes consumed in families pay no tithe, and in aid of this, the case of green peas has been cited. But that is contrary to the general course of law; and is only an exception to the general rule. The court certainly will not extend such an exception. Green peas are a solitary instance of this departure from the general principle; and the exception of them will let in the maxim that *exceptio unius, &c.* If the argument were allowed to prevail, there is nothing which might not be liable to the same exception. The case of green peas rests upon no principle; and it would be too much to desire that a precedent should be made of extension of the exemption to any other article.

As to the agistment moduses, it is said that the same payment which covers grass made into hay, covers that which is eaten by barren cattle. But the tithes are totally different. Hay is a great tithe, and agistment is a small tithe; and it is, therefore, extremely unlikely they should be covered by the same modus.

LORD CHIEF BARON.

This is a bill by the Vicar of Kirkby Stephen, in the county of Westmoreland, claiming the tithes of turnips and potatoes. The general tithe of the vicar is sufficiently proved: the only question is, whether the moduses set up in answer to it, are valid.

I shall get rid of one part of the case, because it is sufficiently clear. The defendants claim an exemption from

the payment of the tithe of potatoes and turnips, if used in the family ; and, in support of this claim, the case of green peas has been alluded to ; but, as that is a solitary exemption, and as I cannot find a case which says that potatoes and turnips grown upon different parts of the farm, but consumed in the family, should be exempted from tithes. I am not inclined to extend it further.

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The defendants set up three moduses : the first, is the garth penny, which is admitted : they then insist on the plough penny ; and the first question which arises is, whether this modus as laid is good in point of law. Whether the payment of one penny for any number of acres can be considered as a valid modus.

Much argument has been drawn on both sides, from two cases, which I cannot reconcile (a). This difficulty occurred to the Master of the Rolls in *Blackburn v. Jepson* (b). His honour said "it is not very easy to mark the precise line of distinction between these two cases, or to ascertain to which of these the present most nearly approaches. I conceive, therefore, it will be most proper to do what has been frequently done under such circumstances ; viz. to postpone the decision of the question of law until it shall be ascertained whether the modus exists in point of fact." I also find considerable objections to the modus, as a legal modus ; but it is difficult to reconcile them with what was said by Lord Chief Baron *Eyre* in *Bennett v. Read*.

It is said this modus is not proved as laid ; but, upon looking through the evidence, I think there is sufficient to support the answer. It is then insisted that this payment must be eleemosynary : but I do not perceive any

(a) *Bennett v. Read*, and (b) *Ante*.
Travis v. Oxton, ante.

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traces that it was ever so considered ; I cannot, therefore, give it that character.

As I think the payment of the penny is sufficiently proved here, to entitle the party to an issue, I will follow the precedent of the Master of the Rolls, and will not decide on the legality of the modus until it is established in fact.

The next question is, whether the modus, paid by certain townships, cover the tithe of agistment as well as hay. The payment of the sums mentioned in the answer are not denied ; but they are said to be only in lieu of the tithe of hay, and certainly hay and agistment are distinct subjects of tithing : but, on the other side, there is strong evidence to shew that agistment was included.

There is no difficulty as to these moduses in point of law. It is said that the tithe of agistment cannot be included in this payment, because agistment was not known at the time before which all moduses are supposed to have originated : but this argument, however good in point of reason, cannot prevail in contradiction to the evidence. Although I happen to know that agistment tithe was not usually paid, yet I am bound to pay attention to the evidence. This species of payment may have existed in very ancient times. There is too much evidence on the part of the defendants, not to direct an issue. Let issues be directed on these points, and dismiss the bill as to those tithes which are covered by the garth penny.

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The Lord Chief Baron afterwards expressed his determination to decide the legality of the plough penny mo-

thus before he sent it to an issue, and directed the drawing up of the decree to be suspended in the mean time; and on the 14th of *February* 1818, his Lordship said he felt himself bound by the decisions to declare that this was a bad modus, and directed an account accordingly.

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Feb. 14.

MEMORANDA.

General order, *November 14, 1817.*—The Lord Chief Baron, taking notice that several causes, standing in the general paper, which should regularly come into the paper of the day, have been omitted, *orders*, that the paper of Causes shall be made out from the general paper as they stand, and that no cause shall be omitted, unless specially directed by himself, upon application to him in this court, except in cases where causes are abated, in which case the cause abated is to be adjourned to the column of abated causes, and notice of such abatement given to the register.

This order does not apply to causes in which the Attorney General is a party.

General Order, *November 20, 1817.*—The Lord Chief Baron directs, that in all cases where abated causes are restored to the paper by order for hearing, they shall be put at the bottom of the paper of the day.

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Nov. 18,
Jan. 17, 1818.

FAIRBROTHER v. PRATTENT AND AITCHESON.

An auctioneer is the agent as well of the purchaser as of the vendor; and if the vendor commence an action against him for the recovery of the deposit, he may file a bill of interpleader, for the purpose of ascertaining to whom it belongs.

The Court will order the defendants to interplead, although one of them has not appeared to the bill, provided the usual process of contempt has been gone through.

THIS was a bill of interpleader, by an auctioneer, against the vendor and purchaser of an estate, who both claimed the deposit money: the plaintiff, after retaining the auction duty, paid the balance of the deposit money into court.

Aitcheson (the vendor) did not appear to the bill; and, after the regular antecedent proceedings, an order was pronounced that the bill should be taken *pro confesso* as against him.

Prattent (the purchaser) put in an answer, which was replied to; but neither party went into evidence. And the cause now came on for hearing.

Mr. *Haslewood* for the plaintiff.—The case, with respect to the plaintiff, is the same as it would have been if both defendants had answered, and one only had appeared by counsel. The plaintiff having discharged his duty, ought not to be prejudiced by the default of the defendants. The order by which the bill is to be taken *pro confesso* against *Aitcheson*, is equivalent to an answer admitting every allegation in the bill. And the plaintiff has a right to read so much of *Prattent's* answer as admits that he claims the deposit money.

If *Prattent* had made out in evidence that the money ought to be returned to him, probably the court would at once have made such a decree, and would have awarded

costs according to the merits (a). But the cause is not ripe for decision between the defendants. The plaintiff is therefore entitled to a decree, that the defendants may interplead, and that his costs may be taxed and paid out of the fund in court, as in *Aldrich v. Thompson* (b), and *Angell v. Haddon* (c). All that *Prattent* can ask in addition to such decree is, a reference to the master, or an issue.

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Mr. *Rose*, for the defendant *Prattent*.—This is not a proper case of interpleader: 1st, the plaintiff is made the agent of the vendor, and cannot sustain a distinct and independent character. 2dly, Without resorting to a court of equity, he might have had complete indemnity, by giving notice to his employer of the demand made upon him, and requiring his employer to resist it, if he thought proper. If, after such notice, the purchaser had recovered against him, the plaintiff would have had his remedy over against the vendor. 3dly, If the plaintiff can be considered as the depository of both parties, this is a case of bailment at law, and there is no occasion to resort to a court of equity.

The Lord Chief Baron, without hearing the reply, directed the cause to stand over, that a search might be made for precedents of a decree in interpleader, where only one defendant had answered.

On the cause being again set down, Mr. *Haslewood*, in reply, said, I have not met with any printed or manuscript precedent, exactly in point. *Hodges v. Smith* appears, from Mr. *Cox's* report (d), to be in some respects analogous: as there a final decree was pronounced against

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(a) See judgment of the Master of the Rolls in *Angell v. Haddon*, 16 Vez. 203.

(b) 2 Broc. C. 142.

(c) 16 Vez. 204.

(d) 1 Cox. 357.

1817—8. a defendant, who (though he had put in an answer) did not appear by counsel at the hearing. But from the Master of the Rolls' statement of the case (*a*), it appears, that the fact on which the court proceeded, in giving final judgment, is (by some mistake) omitted to be mentioned in Mr. Cox's note; viz. that the other defendant had established his case by evidence.

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If this be a proper case of interpleader, the plaintiff is entitled to the relief he prays, without waiting for the determination of the adverse claims of the defendants.

The auctioneer is the agent of the purchaser, who authorizes him to write down his bidding, as well as of the vendor, who authorizes him to put up the estate to sale. A sale by auction is within the 4th section of the statute of frauds; and therefore is not binding, if not evidenced by some memorandum signed by the party, or his authorised agent (*b*). And a memorandum signed by the auctioneer will bind the purchaser (*c*).

The auctioneer, if he were the agent of the vendor only, would be at liberty to pay over the deposit to him: but being a stakeholder, he must keep the deposit until it shall be ascertained to whom it belongs (*d*).

If the plaintiff might circuitously have obtained indemnity at law, he is not, therefore, precluded from his remedy in equity. Such was precisely the situation of the

(*a*) In *Angell v. Haddon*, master v. Harrop, (in appeal)
16 Vez. 203. 13 Vez. 456.

(*b*) *Walker v. Constable*, 2 (*c*) *Emmerson v. Heulis*, 2
Esp. 659. *Buckmaster v. Har-* Taunt. 38. *Kemeys v. Procter*
rop, 7 Vez. 341. *Giles v. Tre-* 3 Vez. & B. 57.
cothick, 9 Vez. 249. *Blagdon v.*

(*d*) *Burrough v. Skinner*, 5
Bradbear, 12 Vez. 466. *Buck-* Bur. 2639.

plaintiff in *Langston v. Boylston* (a). The auctioneer in *Spurrier v. Elderton* (b) took the course alluded to; and the danger of such a course is evident from the result. But the vendor in the present case did not, as in *Spurrier v. Elderton*, intimate his acquiescence in the purchaser's demand; on the contrary, he demanded payment of the deposit money to himself, and threatened to compel such payment by an action. It would not have been a defence to such an action, that an action had likewise been commenced or threatened by the purchaser.

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There can be no interpleader at law but in cases of ravishment of ward, or of bailment: and bailment is the deposit of a chattel to be kept and restored *in specie*.

The deposit of money is not a bailment at law, but is a bailment in equity. It is one of the class of cases in which courts of equity first entertained bills of interpleader, by analogy, to interpleader at law (c).

LORD CHIEF BARON.

This is a bill by an auctioneer: he states in his bill that he was applied to by one party to sell the estate, so that he must have been originally the agent of the vendor. But the instant he put himself into the box as auctioneer, he became agent for both parties, for the purposes for which we consider agency in this court: he sold the estate, and part of the purchase money was deposited in his hands to hold for both parties; if he had paid it over to either, he would have done it in his own wrong. Under these circumstances both parties make a claim upon him for the money; and he files this bill in order to ascertain

(a) 2 Vez. jun. 101. See a dictum of Lord Rosslyn, Id. 109.

(b) 5 Esp. 1.

(c) Lord Redesd. 114, 115.

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to whom it belongs. I think he is clearly entitled *prima facie*, to file a bill of interpleader: there are a great many instances in which bills of this description have been exhibited by auctioneers (a). With respect to the remedy said to be at law, that is a concurrent jurisdiction; and I should not, therefore, dismiss the bill on that account.

The only question then is with respect to the difficulty arising from one of the parties not being before the court; but that does not originate with the plaintiff. If a plaintiff in an interpleading bill be active against one defendant, and neglect to proceed against the other, he certainly is not entitled to the assistance of the court. But no neglect can be imputed here; he has done all which by the practice of the court he was enabled to do: I must, therefore, consider the case in the same manner as I should

(a) The same point was afterwards decided by the Lord Chief Baron, in *Fairbrother v. Nerot and Harris*, 28th Jan. 1818; in which case, as the circumstance of a bill of interpleader being brought to a hearing is of very rare occurrence, (vide the judgment of the Lord Chancellor in *Edwards v. Martinus*, 2 Vez. and Bea. 413., 2d ed.) the reporter hopes the insertion of the decree may not be considered unimportant.

"It is ordered and decreed by the Court that it be, and it is hereby referred to *Abel Moysey*, Esq. the deputy to his majesty's remembrancer of this Court, to tax the plaintiff his costs of this

suit; and also of the action at law commenced against him by the defendant *Nerot*; and that such costs, when taxed, be raised by the said deputy remembrancer by sale, of a sufficient part of 811*l.* 1*s.* 2*d.* 3 per cent. consolidated annuities, now standing in his name, in trust, in this cause, arising from the sum of 478*l.* 6*s.* the amount of the deposit in question, after retaining the auction duty paid into Court by plaintiff, on filing this present bill, (the said deputy remembrancer first applying any cash that may be in Court by the dividend already received, or to be received, on the said 3 per cent. bank annuities, in or towards

have done if *Aitcheson* had been before the court (b). He is before the court in point of law, though not in fact; I am, therefore, under the necessity of giving the plaintiff a decree: the plaintiff's costs must be taxed, and paid out of the fund in court.

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Decree for plaintiff (c).

such payment), and paid to the said plaintiff, or to his clerk in Court. And it is further ordered by the Court, that the said defendant *Nerot* be at liberty to proceed in the action at law already commenced by him against said plaintiff, which the said defendant *Harris* is to defend, in the name of said plaintiff; and both the said defendants are to be bound by such verdict as may be had on the said trial: but no execution is to be taken out after trial of the said action, until this cause shall be further heard after the said trial; and the said defendants, or either of them, are to be at liberty to examine the said plaintiff in this cause as a witness, on the trial of the said action. And it is further ordered, that the consideration, whether either of the said defendants should pay over to the other the amount of the costs to be taken out of Court by the plaintiff; the auction duty retained by said plaintiff; the costs of the said action to

be sustained by either of the said defendants; also the defendant's costs of this suit, and all further directions, are hereby reserved till after the trial of said action; and this cause is to be continued in the paper of causes to be further heard after such action shall have been tried, when such further decree shall be made herein as shall be just."

(b) For the course of proceeding upon bills of interpleader, where one or more of the parties are out of the jurisdiction, vide *Stevenson v. Anderson*, 2 Vez. and Bea. 407. 2d. *Edwards* and *Martinius v. Helmuth*, ibid. 412. in notis, and *Cooper* 245. S. C.

(c) Decree.—Saturday, 17th Jan. 1818.—The Lord Chief Baron doth order, adjudge, and decree, that the said plaintiff's bill, as against the defendant *Aitcheson*, be, and the same is hereby taken as confessed. And it is further ordered and decreed by the Court that it be; and it is hereby referred to *Abel Moysey*, Esq.

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the deputy to his majesty's remembrancer of this Court, to tax the plaintiff his costs of this suit. And it is further ordered, that such costs, when taxed, be paid by the said deputy remembrancer, to the said plaintiff, or his clerk, in Court, out of the sum of 132*l.* 10*s.* cash in Court, paid in by the said plaintiff. And it is further ordered by the Court, that the said defendants do interplead, before the said deputy remembrancer, as to their right to the said deposit money, paid into the hands of the said plaintiff; and the said deputy remembrancer is to report to the Court, to which of the said defendants the said deposit money doth of right belong, and ought to be paid: and the said deputy remembrancer is to send his report to the Court, touching the matters hereby referred to him, with all convenient speed; and for the better ena-

bling the said deputy remembrancer to ascertain to whom the said money ought to be paid, the said deputy remembrancer is hereby armed, &c. And this cause is to be continued in the paper of causes, to be further heard on the coming in of the said deputy remembrancer's report, until which time the consideration whether the plaintiff's costs so to be paid out of the fund in court, shall be received over again by either of the defendants, from the other of them; to whom the fund which shall remain after payment of the said costs shall be paid; and the costs of the said defendants respectively, and all further directions, are hereby reserved: and if any special matter shall arise before the said deputy remembrancer, between the said defendants, the said deputy remembrancer is at liberty to state the same to the court.

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TAYLOR v. BAKER, and Others.

Grays Inn
Hall.
Jan. 17th.

IN the month of *October*, 1814, *James Strong*, one of the defendants, being possessed, amongst other estates, of certain freehold and copyhold lands, comprising, in the whole, about seven acres, subject, as to the freehold part of the premises, to a mortgage term of 1000 years, vested in one *John Ewin*, as a security for 250*l.* interest, which was further secured by a conditional surrender of that part of the premises which was copyhold, borrowed the sum of 300*l.* of the plaintiff; and, as a security for the repayment of it, executed certain indentures of lease and release, bearing date the 30th and 31st days of *October* 1814; whereby, amongst other lands and tenements, he conveyed the freehold, and covenanted to surrender the copyhold part of the lands in question to the plaintiff and his heirs, upon trust, to sell the same in the usual manner; and out of the produce of such sale, after reimbursing himself, his costs, &c. to pay off the mortgages then affecting the premises, and subject thereto, to repay himself the sum of 300*l.* already advanced to *Strong*, and interest; and all such further advances as he might make to the extent of 500*l.* and interest; and after such payments, to pay over the residue to *James Strong*, his executors, administrators, and assigns.

Notice of a judgment against a vendor, is sufficient notice to put a purchaser upon making further enquiry; and if he neglect it, and it afterwards appear that instead of a judgment the party has a specific incumbrance on the property, he will be bound by it.

Costs decreed against a mortgagee under circumstances.

These indentures were enrolled at the next court baron of the manor of which the copyhold portion of the premises in question was held; but no actual surrender of the copyholds to plaintiff's use was ever made. About *Michaelmas* preceding the above-mentioned transaction, the plaintiff had purchased of *Strong* the crop of coleseed growing upon the lands in question, for the use of his sheep; and at the time of the execution of the inden-

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tures, the plaintiff's sheep were actually upon the premises, for the purpose of feeding off the crop, and so continued until long posterior to the transactions after mentioned.

A short time after the date of the plaintiff's security, a meeting took place between *Strong*, *Baker*, and *Metcalf*, who was *Baker's* solicitor, respecting the situation of *Strong's* affairs, when *Baker* agreed to become surety for him in several sums of money, which he afterwards paid to the amount of 250*l.* and upwards; and on that occasion *Strong*, to indemnify *Baker*, agreed to sell him the seven acres of land in question, clear of all incumbrances, for the sum of 500*l.*; and an agreement to that effect was reduced into writing, and signed by the parties on the 7th day of *November*, 1814; in which agreement was contained a clause providing for the repurchase of the premises by *Strong*, whenever he might think proper, on repayment of the purchase money.

No part of this purchase money was ever paid to *Strong*: but on the 10th of *November*, 1814, *Baker* paid the sum of 134*l.* 11*s.* to a person of the name of *Roberts*, in discharge of a debt due to him from *Strong*; and on the 4th of *January*, 1815, he paid the further sum of 250*l.* to Messrs. *Jump* and *Orton*, *Ewin's* solicitors, in satisfaction of *Ewin's* mortgage. Upon which occasion Mr. *Orton* signed an agreement of that date, whereby, on behalf of himself and partner, as solicitors of *Ewin*, he undertook that *Ewin* should execute an assignment of his mortgage term to *Baker*. The remainder of the purchase money was paid to a person of the name of *Bellamy*, another creditor of *Strong*, on the 20th of *April* following.

At the time of the treaty for this purchase, *Strong* stated to *Metcalf*, *Baker's* solicitor, in answer to some enquiries made by him, that he had given the plaintiff

a judgment, or warrant of attorney, as a security for the sum of 300*l.* which he had borrowed of him; but did not say any thing respecting the deeds of the 30th and 31st of October, 1814. In consequence of this statement on the part of *Strong*, *Metcalf* thought proper to make enquiries respecting it; and, accordingly, went to Mr. *Johnson*, the solicitor of the plaintiff, and requested to see his security; whereupon Mr. *Johnson* shewed him the indentures of the 30th and 31st of October, 1814; upon which occasion *Metcalf* made use of the following expression to Mr. *Johnson*:—" *Rot the fellow; he told me it was only a second mortgage:—are you sure he knew what he was signing?*" This took place on the 2nd of *January* 1815; and on the 10th of the same month indentures of lease and release were executed, whereby *Strong* conveyed the freehold, and covenanted to surrender the copyhold part of the lands in question to the use of *Baker*, in fee. These indentures bore date the 2d and 3d days of *January* 1815; but were not executed till the 10th, as before stated. By another deed, bearing date the 3d of *January*, but which was not, in fact, executed till the 14th, *Ewin* assigned the residue of the term of 1000 years, vested in him, to *Metcalf*, in trust, for *Baker* to attend the inheritance, &c.

On the 23rd of *January* following *Strong* surrendered the copyholds to *Baker*, *Ewin* having previously acknowledged satisfaction on the rolls of the manor of the principal money, and interest due on his conditional surrender.

The defendant *Baker* having by these means become possessed of the legal estate in the lands in question, brought an ejectment, on the demise of *Metcalf*, against the plaintiff to recover the possession of them; in consequence of which the plaintiff filed a Bill in this Court to set aside

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the sale to *Baker* as fraudulent, and praying that he might be let in to redeem the mortgage by paying to *Baker* the principal money and interest due upon it, and for a reconveyance of the lands in question upon the trusts of the indenture of the 31st of *October* 1814.

The bill also prayed an injunction to restrain the proceedings in the ejectment on the part of *Baker*; but which the court upon motion refused to grant.

Mr. *Dauncey* and Mr. *Treslove* for the plaintiff.

The only question is, whether this transaction can be said to have taken place without notice of the prior incumbrance to plaintiff. Here was notice, both implied and express. At the time of the sale to *Baker*, the plaintiff was in actual possession of the land for the purpose of feeding his sheep; which was the only way in which he could hold possession, since there was no house upon the premises. This was notice to all the world. In *Daniels v. Davison* (a), it was decided that the possession of a tenant is notice to a purchaser of the actual interest he may have either as tenant, or otherwise; and in *Allen v. Anthony* (b) the Lord Chancellor said, "It is so far settled as not to be disputed that a person purchasing where there is a tenant in possession, if he neglect to enquire into the title, must take subject to such rights as the tenant may have." This was the doctrine in Lord *Hardwicke's* time, in *Smith v. Low* (c). His lordship says "that finding a person in possession of an estate, is sufficient to put the party to enquire; and what is sufficient to put the party upon an enquiry is good notice in equity."

(a) 16 Vez. 249. 17 Vez.
433. S. C.

(b) 1 Merivale 282.
(c) 1 Atk. 490.

Another objection to this sale is, that there was no consideration paid under the contract. It is true that if there had been a debt at the time, that would have been a good consideration; but the defendant says he paid different sums of money to other persons afterwards; that cannot be a payment under the contract: but if it were a payment under the contract: it was made after notice. In *Tourville v. Naish* (a), it was decided that where a purchaser pays part of his purchase money, and gives a bond for the residue, notice of an equitable incumbrance before payment of the money, though after the execution of the bond, will be sufficient. And this doctrine is confirmed in *Story v. Lord Windsor* (b), where upon a plea of purchase for a valuable consideration, without notice, it was held to be necessary that the purchaser should deny notice at the time of paying the purchase money. The same doctrine is also laid down by the Lord Chancellor in *Maundrell v. Maundrell* (c). In the present case there was sufficient notice before payment of any part of the purchase money. The agreement for the sale was dated on the 7th November; and on the very day on which it was entered into *Strong* stated that the plaintiff had a judgment or warrant of attorney against him. This was sufficient notice to put the defendant upon enquiry; and that it had that effect is clear from the circumstance of *Metcalf* applying to the plaintiff's solicitor, who shewed him the deeds of 30th and 31st October 1814. At all events, it is clear the defendant had notice before the execution of the conveyance to him; and that, according to the decision in *More v. Mayhew* (d), is sufficient to bind him. The same doctrine is laid down by Lord Hardwicke in *Wig v. Wig* (e).

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(a) 3 P. Wms. 307.

(b) 2 Atk. 630.

(c) 10 Vez. 271.

(d) 1 Ch. Ca. 34.

(e) 1 Atk. 384.

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Mr. *Martin* and Mr. *Wakefield* for the defendant *Baker*.

—Unless *Baker* had notice of the plaintiff's claim, he is as much entitled to protection in a court of equity as the plaintiff. The question, therefore, is, whether he had such notice of the incumbrance to plaintiff as ought to have put him upon making further enquiry. It has been contended that the circumstance of the plaintiff's sheep being upon the land was sufficient to apprize him that the plaintiff had some claim in the land; and several cases have been referred to in support of this doctrine: but all those cases were decided upon particular circumstances; and, therefore, can have no effect in establishing a general rule. If the rule contended for were to prevail, no man could sell a crop of grass to a butcher without embarrassing the sale of his estate. That argument, therefore, is quite out of the question.

The material point is the notice given to *Baker* before the advances made by him on account of *Strong*. This case is different from all the other cases which have been cited. *Baker* was liable to pay *Strong's* debts; and had, therefore, a right to secure himself by purchasing this estate. He bargained for nothing but an equitable estate; and in equity a debtor is equally bound to pay all his creditors; so that, *prima facie*, his right was equal to plaintiff's. Any creditor, however, has a right to clothe himself with a better security; and this has been done by *Baker*. Notice of a mere warrant of attorney can never bind the purchaser. Suppose a man were to be in treaty for the purchase of an equitable interest, and any person were to inform him that the vendor had given another a warrant of attorney,—would he be bound to enquire of the creditor whether he intended to act upon the warrant?

The first intimation which *Baker* received of the real situation of the property was on the 2nd of *January*; and

then he had paid part of the purchase money. With respect to *Tourville v. Naish* (a): the first part of that case is certainly in favour of the plaintiff; but the latter part is in point for the defendant. The Court will not sever the purchase money. Suppose a man contracting to purchase an estate at 5000*l.* were to pay part, and to secure the other by bond,—would the Court consider the security as applicable only to that which was already paid? The act itself shews that he could not have been aware of the nature of the security. This is like the case of a third mortgagee buying in the first, which the Court will always permit, where, at the time of the third mortgage being entered into, the mortgagee had no notice of the second incumbrance.

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With respect to costs, the plaintiff ought to have made all his securities available before he disturbed the defendant's purchase: but it does not appear that he has taken any steps of that nature; he cannot, therefore, be entitled to costs.

LORD CHIEF BARON.

This is a bill by *Taylor* against *Baker*, who is the only substantial defendant to set aside a purchase made by *Baker*, of some land previously conveyed to *Taylor* as a security for money.

In the month of *October*, 1814, *James Strong* being the owner of the property in question, subject to a mortgage to *Ewin*, borrowed of *Taylor* the sum of 300*l.*; and, as a security for that and other advances, executed a conveyance of the equity of redemption to *Taylor* in fee, in trust to sell and pay off the debt. In the deed by which this conveyance is made, there is a covenant to surrender

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the copyholds to the use of *Taylor* in fee ; so that *Taylor* became possessed of a clear equitable interest, in the property in question, to the extent of his own demand against *Strong*. This conveyance was made on the 31st of October, 1814 ; and on the 7th of November following, *Strong*, *Baker*, and *Metcalfe*, the solicitor, had a meeting, respecting the advance of some money to pay off *Strong's* debts ; when it was agreed that, to secure *Baker's* advances, the sale in question should take place. On that occasion, *Strong* being asked whether he had given any security to plaintiff, said he had given him a judgment, or a warrant of attorney, so that *Baker* and *Metcalfe* had clear notice that some security had been given by *Strong* to *Baker*.

Three days after this meeting *Baker*, in part performance of his contract, paid to one of *Strong's* creditors the sum of 134*l.* 11*s.* in discharge of a debt due from *Strong*.

One of the questions which arise in this case is, whether this notice of a judgment was not such notice to *Baker*, as should have induced him to make further enquiry.

On the 2nd of January, 1815, *Metcalfe* came to *Johnson*, as attorney for plaintiff, and asked him what the nature of the plaintiff's security was ; upon which *Johnson* produced the deeds of conveyance to plaintiff, and so gave full notice of the whole state of the incumbrance.

On the 10th of the same month, however, a conveyance was made of the property in question to *Baker* ; the term was assigned on the 17th, and on the 23d a surrender was made of the copyholds. *Baker* paid the residue of his purchase money to *Bellamy*, on the 20th of April following.

All these transactions took place after full and com-

plete notice of the plaintiff's incumbrance. *Baker* having procured the assignment of the mortgage to a trustee for himself, unquestionably gained a right to make use of it in the same way as any other mortgagee in a similar situation might have done. Under these circumstances the plaintiff files his bill for an account and redemption against *Baker*, and says, "You are precisely in the same situation as *Ewin*." But *Baker* says, "I have the legal estate; and having that I have ousted *Taylor* of the premises: he cannot have the estate, without paying me every thing that is due to me. I had an equitable estate; and the plaintiff having only the same interest, we were in *pari conditione*, and whichever could get the legal estate took the benefit of it. It was the *tabulam in naufragio*."

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In general, the rule of the court is, that if there be two persons in similar situations, with equal equity, and one procures the legal estate, the legal estate shall prevail: but then they must have equal equity.

If *Baker* had, *bond fide*, advanced money to *Strong*, without knowing that any thing was due to *Taylor*, he would have had an equal right with *Taylor*: but if he knew of *Taylor's* interest, he cannot, by getting in the legal estate, exclude him from the benefit he had before.

The only question then is, whether *Baker* had notice of *Taylor's* claim or not? and I think that he had.

When I ask a person who sells an estate to me, whether there be any incumbrances on the estate, and he tells me there is a mortgage, that is clear notice of the mortgage. Where then is the difference? The defendant has notice that there is a judgment: that surely is sufficient to call upon him to make further enquiry; and the defendant's solicitor certainly did act under that impression. Is not a judgment a lien upon the land?

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and can a purchaser, having notice of such a lien, say, with any fairness, that he had no notice of any claim on the estate? It seems to me, therefore, that he had notice of a security; and having such notice, he was bound to make further enquiries (a). It is impossible to

(a) It has long been decided, that whatever puts a party upon enquiry, is good notice in equity, *Smith v. Lowe*, 1 Atk. 489. the courts requiring that every precaution should be taken by a purchaser, which a person of ordinary prudence would take. *Hill v. Simpson*, 7 Vez. 152. *vide* 170. *Hiern v. Mill*, 13 Vez. 120. Upon this principle it has been determined, that in all cases, where a vendor cannot make out a title but by a deed which leads to another fact, the purchaser will be affected with notice of that fact; for it is *crassa negligentia*, if he seek not after it, *Moore v. Bennett*, 2 Cha. Ca. 246. *Bisco v. Earl of Banbury*, 1 Cha. Ca. 287. *Draper's Company v. Yardley*, 2 Vern. 662. *Mertins v. Jolliffe*, Ambler 313. And if a mortgage be made, or a lease granted, in consequence of the surrender of a former lease, by which former lease an adverse title would appear, the mortgagee will be affected with

notice of such title. *Coppin v. Fennyborough*, 2 Bro. Cha. Ca. 291. Upon the same principle it has been decided, that where a man knows that the legal estate is in a third person at the time he purchases, he is bound to take notice of the trust, *Anon.* 2 Freem. 137. Pl. 171. But where a term is assigned generally, to attend the inheritance, it will not of itself be notice to a purchaser of any thing, but that there is an inheritance to be protected, and that the term is attendant (which he knew before): but if it be declared in the assignment, that the term is assigned to attend the inheritance, *as limited, or settled by a particular deed, or to protect the uses of a settlement*, that will be notice of the deed or settlement, and of all the uses of it. Per Lord *Hardwicke*, in *Willoughby v. Willoughby*, cited in 1 Term R. 768. It being a settled principle that, if a purchaser have notice that there is a deed, he will be bound by the whole

lay out of the consideration of this case the expression *Metcalfe* made use of, on being informed of the conveyance to plaintiff:—" *Rot the fellow ; he told me it was a mortgage.*" That makes it as clear a case as I ever heard : I must decree for the plaintiff.

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Another question arises with respect to costs : in general, a mortgagee is entitled to costs ; but that is not an uni-

of its contents, *Ferrars v. Cherry*, 2 Vern. 384. For this reason, notice that there is a lease is notice of all its contents, and of all the covenants in it, *Tanner v. Florence*, 1 Cha. Ca. 259. *Hall v. Smith*, 14 Vez. 426. ; and, therefore, where a lease for lives contained a covenant to grant a new lease on the dropping of a life with the same provision for renewal on the death of any person, to be named in any future lease, a purchaser having notice that there was a lease, although he was not aware of the covenant, was ordered to grant a new lease with the same provision, *Taylor v. Stibbert*, 2 Vez. Jun. 426. It seems, however, that the mere fact of his having attested the execution of a previous deed will not affect a purchaser with notice of the contents of that deed, *Beckett v. Cordley*, 1 Bro. C. C. 353. Although a contrary opinion appears formerly to have prevailed, Vide *Mocatta v. Murgatroyd*, 1 P. Wms. 393. Vide etiam Mr. *Cox's* note upon that case, *ibid.* The possession of a tenant is notice of his whole interest, 2 Vez. jun. 440. *Hiern v. Mill*, 13 Vez. 120. whether as tenant or otherwise, *Daniels v. Davison*, 16 Vez. 249.—17 Vez. 433. S.C. and even of an interest, accrued by a title posterior to that on which his possession is founded, *Allen v. Anthony*, 1 Merivale 283. But possession is not even *prima facie* evidence of title, because it may be either by sufferance or trespass : a purchaser, therefore, is bound to enquire into a title, though the party of whom he purchases be in actual possession ; and if, upon being asked for the deeds, the vendor acknowledge that he has them not, the purchaser must make further enquiry, 13 Vez. 122.

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versal rule; and if it were, I should feel myself bound to depart from it when necessary: I am, however, supported by a decree of the Master of the Rolls, in which his honour made a mortgagee pay costs (a).

The mortgagee in this case has acted in an extremely dishonest way: knowing of the plaintiff's incumbrance he deals with the mortgagor behind his back. He says, I know the plaintiff has this charge, but will oust him of his right; I cannot allow such a mortgagee to have his costs: they are not costs imposed by any contract between the parties.

With respect to the ejectment, the defendant had a right to get into possession: I therefore shall not interfere with that; *Strong* is not to have his costs.

Decree for plaintiff (b).

(a) Vide also *Detillin v. Gale*, *Leather* there cited.
7 Vez. 583. and *Shuttleworth v.*

Decree.

(b) *Saturday, Jan. 17, 1818.*
—The Court doth declare that the sale of the freehold and copyhold premises in the pleadings of this cause mentioned, by the defendant *Strong* to the defendant *Baker*, is a fraud upon the conveyance made by the said defendant *Strong* to the said plaintiff in the said pleadings mentioned. And it is thereupon ordered, adjudged, and decreed, by the Court, that such sale be, and the same

is hereby set aside accordingly.

And the Court doth declare that the said plaintiff is entitled to redeem the mortgage made to *John Ewen* in the said pleadings mentioned, and assigned by him to the said defendant *Baker*. And for that purpose it is ordered, adjudged, and decreed by the Court, that it be, and it is hereby referred to *Abel Moysey*, Esq. the deputy to his Majesty's Remembrancer of this Court, to

take an account of the principal money and interest due on the said mortgage, so made to the said *John Ewen*, and assigned by him to the said defendant *Baker* as aforesaid.— And it is further ordered and decreed by the Court that, upon payment by the plaintiff of what shall be found due to the said defendant *Baker* on taking the said account, after deducting the costs hereinafter mentioned, the said defendants *Baker* and *Scrimshire*, shall convey and surrender, at their own costs and charges, the said freehold and copyhold premises to the said plaintiff and his heirs, or as he shall direct; and that said defendant *Metcalf* shall assign the freehold part of the said premises for the residue of the term of 1000 years to the said plaintiff, or as he shall direct, at the costs and charges of the said plaintiff; and that such conveyance and assignment be settled by the said deputy remembrancer, to whom it is hereby referred to settle the same in case the parties differ. And it is further ordered and decreed by the Court, that the said defendants do deliver up

to the said plaintiff the said conveyance, mortgage, and assignment, and all other title deeds, evidences, papers, and writings, in their or either of their custody, possession, or power, relating to the said freehold and copyhold premises. And it is further ordered and decreed by the Court that it be, and it is hereby referred to the aforesaid deputy remembrancer to tax the said plaintiff, and the said defendants *Metcalf* and *Scrimshire*, their costs of this suit; and that the costs of the said defendants *Metcalf* and *Scrimshire*, when taxed, be paid to them by the said plaintiff. And it is further ordered and decreed by the Court, that the said plaintiff shall be at liberty to deduct what shall be allowed to him by the said deputy remembrancer in respect of his taxed costs, and what he shall pay to the said defendants *Metcalf* and *Scrimshire* in respect of their taxed costs out of the money which shall be found by the said deputy remembrancer to be due to the said defendant *Baker*, upon taking the account hereinbefore directed, &c.

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DAVIES v. DAVIES and Others.

Legacies charged on a reversion directed to be raised by sale or mortgage, and declared to carry interest from the death of the testator, it not appearing from the will that the estate charged was a reversion.

REESE *Lewis Davies*, being entitled to a reversion in fee, expectant on the death of the survivor of *Lewis Davies*, and *Jonnett* his wife, of and in certain lands in the county of *Caermarthen*, called *Tyny coed*, made and published his last will and testament, bearing date the 2nd July 1791, and executed and attested so as to pass freeholds, and thereby made the following devise, viz.—“I give and bequeath to my sister *Esther Davies* the sum of 40*l.* to be paid on the land called *Tynycoed*, situate, lying, and being, in the parish of *Methvey*, and county of *Caermarthen*. Also, if the above-named *Esther Davies* happen to die before her son *William Davies*, the above sum is to go to *William Davies* her son. And I give and bequeath to my sister *Ann Jeffreys* the sum of 20*l.* to be paid on the land above-named, situate, lying, and being, in the parish of *Methvey*, in the county of *Caermarthen*, by my executor hereunder named. Also I give and bequeath unto my brother *Lewis Davies* (one of the defendants) all the above-named messuage, tenement, or land, called *Tynycoed*, situate, &c. and his heirs and assigns for ever: and I nominate and appoint dear brother *Lewis Davies*, of the aforesaid parish and county, to be my sole executor and residuary legatee of whatsoever is not herein mentioned.”

The testator died in September 1791, and the defendant *Lewis Davies* proved his will. *Lewis Davies*, one of the tenants for life of the estate, died in March 1805; and *Jonnett Davies*, the other tenant for life, died in March 1813; previously to which, however, viz. in the month of January preceding, *Lewis Davies* sold and conveyed his reversion in the *Tynycoed* estate to Sir George Griffiths

Williams, another defendant, who, upon the death of *Jonneth Davies*, the last tenant for life, entered into possession of the property.

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The object of the present suit was to have the legacies of 40*l.* and 20*l.* by the will bequeathed to *Esther Davies* and *Ann Jeffreys*, raised and paid; and the principal points in dispute were, whether they were to be raised by sale or mortgage, or were to be paid out of the rents and profits of the land as they accrued, and whether the legatees were entitled to interest on their legacies from the death of the testator, or from the death of the tenant for life.

Mr. *Martin* and Mr. *Richards*, for the plaintiffs, insisted on a sale or mortgage, and on the right of the legatees to interest from the death of the testator.

Mr. *Wingfield* and Mr. *Phillimore*, for the defendants *Lewis Davies*, and Sir *George Griffiths Williams*, contended that as the will contained no direction for the sale or mortgage, the legacies could not be raised by that means; and that no interest should be paid till after the death of the tenant for life. That the legacies being charged upon the estate, could not take effect till the testator's interest came into possession: that if the testator had meant it otherwise, he would have directed a sale of the reversion: but as there was no direction of that nature in the will; it must be presumed that the legacies were not intended to be payable until the estate came into possession.

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This is a bill by the legatees of a testator against the devisee and purchaser of an estate for the payment of legacies charged upon it. The will directs that these legacies shall be paid on the land; and I cannot conceive how

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this can be complied with, unless by the ordinary course of sale or mortgage. The court is in the constant habit of directing sales for the purpose of giving effect to this species of legacy. But it is said, that this is a reversion, and that the testator could not intend the legacy to be paid before it came into possession. It does not however appear to be a reversion from the will : it is not sufficient that it should be so alleged in the bill ; it should appear from the will. Here the testator says nothing about it, nor does he fix any time of payment ; the law therefore fixes the time. I never saw a clearer case in my life ; the will directs the legacy to be paid out of an estate, and that estate happens to be a reversion : but a reversion is as capable of being sold or mortgaged as any other estate.

Decree for plaintiffs. (a)

Decree.

(a) *Monday*, the 19th day of *January*, 1818.—It is ordered, adjudged, and decreed by the Court, that it be, and it is hereby referred to *Abel Moysey*, Esq., the deputy to his majesty's remembrancer of this Court, to take an account of what is due to the plaintiffs, in respect of the two legacies in the pleadings stated, given by the will of the said testator, *Rees Lewis Davies*, and to compute interest on the said legacies from the death of the testator *Rees Lewis Davies*, in *September* 1791, to the time of payment of the principal of said legacies, which interest is to be computed at the rate of 4l. per cent. per annum. And it is also referred to the said deputy remembrancer to tax the said plaintiffs their costs of this suit, and also the costs of the said defendant *William Davies*, which latter costs of defendant *William Davies* are to be paid to him by the said plaintiffs ; and they are to receive and be paid the same over again, together with their own costs, in manner after directed. And it is further ordered and decreed by the Court, that it be, and it is hereby referred to *Abel Moysey*, Esq. the said deputy remembrancer, to raise the amount

of the said legacies, interest, and costs, by sale or mortgage, of so much of the estates devised to the defendant *Lewis Davies*, charged with the said legacies as may be sufficient for that purpose; and if by sale, the said deputy remembrancer is to cause the usual advertisements to be inserted in the *London Gazette*, and such other papers as he shall think fit, announcing such sale: but in case the said parties shall proceed to raise by mortgage the money necessary for the purposes aforesaid, they are at liberty so to do upon proceeding therein without delay. And it is further ordered by the Court, that the costs of the said plaintiffs, and of the defendant *William Davies*, when obtained by the means aforesaid, be paid to the said plaintiffs, *Thomas Davies* and *Rees Jeffries*, or to one of them, or to their clerks in Court. And it is further ordered, that the amount of the legacy of 40*l.*, when raised, be paid into Court, in trust, in this cause; and that the interest thereon, when raised by

the said deputy remembrancer, be paid to the said plaintiffs, *Thomas Davies*, and *Esther* his wife. And it is further ordered by the Court, that the said sum of 20*l.*, and the interest to be computed thereon, be paid to the said plaintiffs, *Rees Jeffries*, and *Ann* his wife. And it is further ordered, that the sum of 40*l.*, the amount of the plaintiff *Esther Davies's* legacy, when paid into Court, as before directed, be laid out by the deputy remembrancer, in his name, in the purchase of bank 3 per cent. consolidated annuities; and that the deputy remembrancer do from time to time receive the dividends thereof, and pay the same over to the said *Thomas Davies*, and *Esther* his wife, for and during the life of the said *Esther Davies*, with liberty to the defendant *William Davies*, or any other person interested therein, after her death to apply to the Court, touching the same as they shall be advised; in the taking of which said accounts the said deputy remembrancer, &c.

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January 19.

RANDOLPH, Clerk, v. GORDON and Others.

Entries in a book coming out of the possession of a defendant who was the grandson of a preceding rector not allowed to be read as evidence to support a modus on the testimony of a witness who said he believed it to be in the rector's handwriting, from comparing it with the original will of the rector in Doctors' Commons.

IN this case the following question arose upon the evidence.

The plaintiff was rector of *Much Hadham* in the county of *Herts*, and instituted the present suit against the defendants for the tithes of hay and grass. The defendants by their answer set up two moduses, in support of which their counsel offered to read in evidence certain entries from a book purporting to contain, amongst other things, a statement of the customs in the parish respecting tithes, which was introduced by the testimony of a person of the name of *Thomas Mott*, who deposed, that "the book in question was the property of *Francis Stanley*, one of the defendants, from whom he received it: and that he believed that the whole of the writing in the said book to be the handwriting of *William Stanley*, doctor in divinity (who was the grandfather of the defendant *Stanley*, and had been rector of the parish from the year 1690, to the year 1723). And he further deposed, that he, the witness, was the better enabled to state of whose handwriting he believed the book to be, from having compared the writing in the book with the original will in Doctors' Commons, of the said *William Stanley*, which appeared to be wholly in his own handwriting, and that he believed the book and the will to be written by one and the same person."

Mr. *Dauncey* and Mr. *Boteler*, for the plaintiff, objected to the book being read, because it did not come out of the proper custody, and because the witness's knowledge of the testator's handwriting was derived only from a comparison of it with that in the will.

Mr. *Fonblanque*, Mr. *Martin*, and Mr. *Palmer*, for the

defendants.—In *Buller's Nisi Prius* it is stated, that in a case before lord *Hardwicke*, where a parson's book was produced to prove a *modus*, the parson having been long dead, a witness, who had examined the parish books, in which was the same parson's name, was permitted to swear to the similitude of the handwriting (a); and in *Roe v. Rawlins* (b), Mr. Justice *Le Blanc* permitted an entry to be proved by a comparison of handwriting, on the ground that at that distance of time no better evidence could be produced. The case of *Morewood v. Wood* (c) is nearly in point: there proof of handwriting was admitted, by shewing the similarity of that in question to the handwriting of a will; and no objection was taken either at bar, or by the court. If this species of proof were not to be admitted, it would destroy almost all evidence arising from receipts given by parsons to occupiers; as, in many cases, there can be no other way of proving such ancient documents. Old deeds are held to require no proof of handwriting; and the principle upon which this rule rests is, that from the antiquity of the instruments, it would in most cases be impossible to prove the handwriting of the parties executing. But books cannot prove themselves; and, therefore, from the necessity of the case we must resort to some such medium of proof as the present, as otherwise, instruments of this nature would be of no avail. This is the best evidence which the nature of the case admits of. In a case which occurred some years ago on the northern circuit, *Earl of Egremont v. Lord Vavasour*, books coming from a chest in which the manorial documents were kept, and purporting to have been written by a former steward of the manor, were received without further proof on the ground of their antiquity; and the impossibility of proving the handwriting at so distant a period. But here we offer further proof arising

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(a) P. 236.

(c) 14 East. 327, in notis.

(b) 7 East. 382.

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from the similarity of the handwriting : although the whole of the will may not have been written by the testator, his name must at all events have been in his handwriting; and that would be sufficient to form a comparison. If the book had come out of the possession of another person not interested, there is no doubt but it would have been evidence. Rector's books handed from rector to rector, and coming out of the proper custody, are always admitted with very trifling additional testimony. There is no doubt but that if *Stanley* had not been a defendant, and this book had come out of his custody, it would have been received;—why then should *Stanley's* being a defendant make any distinction? In *Bertie v. Beaumont* (a), a receipt was admitted, though it came out of the custody of the defendant, without any proof of the handwriting; and there the court said, “the person to whom the receipt was given being of the same name, there was reasonable inference that they were so connected as to make this the proper custody; and reasonable evidence of proper custody is all that can be required, and is sufficient.” In this case there is the same species of evidence; the defendant out of whose possession the book comes, is of the same name with the former rector; and we have the additional fact in proof, that he is one of the same family.

Mr. *Dauncey*, in reply, was stopped by

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If this book had come from the proper custody; that is, if *Stanley* had proved that he was grandson of the former rector; and that he had found this book among his grandfather's papers, there is no doubt it would have been admissible as evidence: but that is not done in the

present case; the book is merely proved to have come out of the custody of a person who is a defendant and a grandson, but there is no evidence to shew where it was found. There are many cases in which books of this sort have been rejected, because they did not come out of the proper custody. I recollect a case in which a book was attempted to be produced as coming out of the *Bodleian* library, but the Court would not receive it. The case is the same with respect to *Terriers*. I therefore do not think I can receive this book; coming, as it does, out of the custody of a defendant, without some further evidence.

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But then it is said that this book is in the handwriting of the former rector; and if so, it is certainly of great value, because books written by preceding rectors are always evidence against their successors. But how is the handwriting proved? Here is a book produced, we will say, for the sake of argument, from the street; and I am called upon to believe it to be in the handwriting of the former vicar, because it is said to be very like it. I recollect many cases in which books have been rejected, although the similarity of the handwriting to writings by the same person had been proved in a tolerably satisfactory manner. But let us for a moment suppose that a book might be proved in this manner,—what is the evidence here? The witness looks at the book, and says he is induced to believe it to be in the handwriting of a preceding rector; not because he was a person residing at a great distance, and in the habit of corresponding with him, but because the handwriting in the book is the same with that of the rector's will in Doctors' Commons. We all know that most people do not write their wills themselves. The witness says he believes the whole of the will to be in the handwriting of the rector;—but how can he know that? He goes to the registry, and finds a will there, purporting to be written by somebody who wrote the whole of it; and upon this he ventures to swear that it was all

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written by the testator. All he could with any correctness say was, that the will appeared to be all in one handwriting, and that therefore he concluded some person wrote the whole of it. That person certainly may have been the person who wrote this book; but it does not follow that it was written by *Stanley*. Unless it can be alleged that because a paper appears to be a will, it is in the handwriting of the person whose will it appears to be, such evidence as this can never be received.

Evidence rejected.

SHAW v. PICKTHALL, and Others.

Bequest of stock to be laid out in rebuilding almshouses. The fact that almshouses were in mortgage before the 9th Geo. II. c. 36. proved by an old inscription, and an extract from a local history.

THIS bill was filed by the plaintiff as one of the trustees named in the will of *Robert Mason*, for the purpose of ascertaining to whom the sum of 800*l.* navy 5 per cent. annuities, part of the testator's estate, standing in the joint names of himself, and of *Spencer Newman*, one of the defendants, belonged. The testator, by his will, directed that the sum of 1000*l.* (which was reduced by a codicil to 800*l.*) navy 5 per cent. annuities, after the death of his nephew *Robert Stockeld*, to whom the dividends were to be paid for his life, should be transferred into the joint names of the plaintiff and *Spencer Newman*, who were his executors, and of the then officiating minister, churchwarden, and overseer, of the town quarter of the parish of *Waltham, Holy Cross*, and their successors for the time being, "upon special trust and confidence, that they, the said executors, minister, churchwarden, and overseer, and their successors, should, within the next summer months between *Lady-day* and *Michael-*

mas, after the decease of his nephew *Robert Stockeld*, have the receiving, laying out, and expending of the said 1000*l.* navy 5 per cent. annuities, for the sole and only purpose of rebuilding, in a plain, strong and substantial manner, the four almshouses at the west end of the entrance into the town of *Waltham* therein mentioned, for the use, benefit, and reception, of poor widows, to inhabit and dwell therein, in the same way and manner, as the same charity always had theretofore been, and was then regulated and governed, since the original foundation and endowment thereof, and to and for no other use, trust, intent, or purpose whatsoever. But in case the said stock should be more than sufficient to rebuild the said almshouses, then the said testator desired that the residue and remainder of such stock should be laid out and expended in bread, and given unto such poor widows, between *Michaelmas* and *Lady-day*, by weekly allowances, from year to year, so long as the residue and remainder of such stock should be to be expended, according to the discretion of the surviving parties having the management thereof for the time being."

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Robert Stockeld, the testator's nephew, to whom the dividends were given for life, having survived the testator, died in *February*, 1816; and upon his death, the 800*l.* stock in question was transferred into the names of plaintiff, and of the defendant *Spencer Newman*, and was claimed by the minister, churchwarden, and overseer, of the town quarter of the parish of *Waltham, Holy Cross*, upon the trusts of the will; in opposition to which, however, a claim was set up by *William Young*, the testator's next of kin, on the ground that the bequest was void under the Statute of Mortmain (a).

The only question was, Whether the lands upon which

(a) 9 Geo. II. c. 36.

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the almshouses in question were built, were in mortmain before the passing of the statute.

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Mr. *Dauncey* and Mr. *Duckworth* for the plaintiff.

Mr. *Trower* for the minister, churchwarden, and overseer, relied upon the evidence of a witness in the cause, who deposed that ever since he had known the almshouses in question, the following inscription, carved in stone was fixed in the centre of the front of them :—

“ Birth is a pain ; life, labour, care, toil, thrall.
 “ In old age strength fails ; lastly, death ends all.
 “ Whilst strong life last, let virtuous deeds be shewn ;
 “ Fruit of such trees are hardly thereby seen or known
 “ To have reward with lasting joys for Ay,
 “ When vicious actions fall to end’s decay.
 “ Of wealth o’rplus, land, money, stock, or store,
 “ In life therewith relieve aged, needy, poor ;
 “ Good deeds defer not till the funeral rites be past.
 “ In lifetime what’s done is made more firm, sure, and fast :
 “ So ever after it shall be known and seen
 “ That leaf and fruit shall ever spring fresh and green.”

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As a further proof that this inscription was made at the time it bore date, he read an extract from *Farmer’s History of Waltham*, published in the year 1735, page 38, viz. “ There are also several houses given for the use of the poor, amongst which are four at the entrance into the town, and on which there is the underwritten inscription in old verse, dated 1626:” (then followed the inscription,) “ these four houses were given by ———. *Green*, purveyor to king *James* the First, for four widows ; the land that belongs to them, was let lately at 4*l.* per annum.”

Mr. *Agar*, for the next of kin, contended, that this evidence was not sufficient to prove that the almshouses in

question were in mortmain previous to the statute, and that the deed or instrument by which the land on which the almshouses were built was granted ought to be produced.

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There can be no doubt as to this case. From the ancient date of the inscription, we must presume that these buildings were in existence long before the statute. Declare that the minister, churchwarden, and overseer, are entitled to the 800*l.* 5 per cent. annuities bequeathed by the testator, and that they must apply it according to the trusts of the will.

The costs of all parties must be paid out of the fund.

WRIGHT and Others v. BELL.

January 21.

THE bill prayed the specific performance of an agreement entered into by the defendant with the plaintiffs, as assignees of *Spencer Compton*, a bankrupt, for the purchase of a debt of 55*l.* 1*s.* 2*d.* due to the estate of the bankrupt, and of *George Andrews Pourtales*, from a person of the name of *Lespinasse*, on the balance of an account between them.

Specific performance decreed of a contract for the purchase of a debt.

The circumstances of the case were as follows:—

The bankrupt *Compton*, previously to his bankruptcy, carried on business as a merchant in copartnership with *Pourtales*; but, in consequence of *Pourtales* being resident

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in *Paris*, the commission was awarded against *Compton* alone, who was thereunder duly found a bankrupt.

Shortly after the commission a meeting took place of the creditors of *Compton* and *Pourtales*, for the purpose of considering the state of the outstanding debts due to the firm; when it was agreed that the plaintiffs, as assignees, should be at liberty to sell sundry of such outstanding debts for the benefit of the creditors. In pursuance of this agreement the plaintiffs, in *December 1808*, contracted with Mr. *David Milne*, who was the agent for the defendant, for the sale to him of the debt in question, being the sum of 552*l.* 14*s.* 1*d.* alleged to be due from *Lespinnasse* on the balance of accounts between him, and *Compton*, and *Pourtales*, for the sum of 500*l.* In pursuance of this agreement a draft of an assignment from the plaintiffs to the defendant was prepared by the plaintiff's solicitor, and laid before the solicitor of the defendant for his approbation: but an objection was made by the defendant's solicitor to the performance of the contract on the part of the defendant, unless *Pourtales* would join in the assignment. In order to obviate this objection it was proposed, on the part of the plaintiffs, that *Compton*, who had obtained his certificate, and was in solvent circumstances, should enter into a covenant to indemnify the defendant against any claim which *Pourtales* might make upon him in respect of the debt. This being objected to by the defendant's solicitor; the plaintiffs, to remove every difficulty in the way of the completion of the contract, in *April 1811* procured from *Pourtales* an assignment to themselves of all his estate and interest, in the outstanding debts and effects of the copartnership between him and *Compton*, which was afterwards confirmed by another indenture dated the 14th *May 1815*.

The defendant, nevertheless, refused to complete his

purchase; and the plaintiffs instituted the present suit to enforce the specific performance of the contract.

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Mr. *Dauncey* and Mr. *Girdlestone*, for the plaintiffs, insisted, that all objections to the performance of the contract on the part of the defendant were removed by the assignment from *Pourtales*; that although a debt was not assignable at law, yet an assignment of a debt was good as an agreement in equity.

Mr. *Agar* and Mr. *Roupell*, for the defendant.—Admitting, for the sake of argument, that the existence of the debt is sufficiently established, there is no case in the books of any bill of this nature. Courts of equity will not enforce an agreement as to chattels, except as to those things which cannot be recovered at law. In the ordinary case of bills for the purpose of compelling the transfer of stock, the courts have refused to compel a specific performance. In *Dorison v. Westbrooke* (a), the court dismissed a bill of this description. In *Cud v. Rutter* (b), Lord Chancellor *Parker* reversed a decree made by Sir *Joseph Jekyll*, for the specific performance of an agreement of the same nature. The same point was also decided in *Capper v. Harris* (c). In *Buxton v. Lister* (d), which was a case of an agreement for the purchase of timber, six years was given by the contract for the payment of the purchase money, and the Court took a distinction between cases where the agreement is final, and where it is to be made complete by subsequent acts. In that case the Lord Chancellor said, that “in general this Court will not entertain a bill for the specific performance of contracts of stock, corn, hops, &c.

(a) 5 Vin. Ab. 540. Pl. 22. *Scould v. Butter*, 2 Eq. Ca.

(b) P. Wms. 570: 5 Vin. Ab. 18. Pl. 8.

Ab. 538. Pl. 28. Prec. in ch. (c) Bunb. 135.

534. S. C. and by the name of (d) 3 Atk. 383.

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for as those are contracts which relate to merchandize that vary according to different times and circumstances, if a court of equity should admit such bills, it might drive on parties to the execution of a contract to the ruin of one side, when upon an action that party might not have paid above a shilling damages." If this be applicable to corn and hops, how much more does it apply to debts which at one time may be worth something, and at others nothing. The real distinction as to cases in which courts of equity will or will not interfere with respect to chattels, is laid down in *Pearne v. Lisle* (a), namely, that where the party injured can have satisfaction in any other way, the Court will not interfere. The same principle appears to have been acted upon in *Douglas v. Vincent*. (b)

No case can be adduced in which the courts have decreed the specific performance of an agreement of this description. The court cannot give the thing demanded, it can only give a right of action; it will only interfere in cases where the contract is *executed*, here it is only *executory*.

In all cases where the court has decreed a specific performance, something has been done which imposes an obligation on the conscience: but here nothing of that nature has been done; it is merely a verbal contract to purchase an unascertained debt. No act towards the performance of this contract has been done by either of the parties: if any had been done, the court might have interfered; this is merely a *nudum pactum*.

It is also extremely material in this case to attend to the dates. At the time of the contract the assignees had power to dispose *Compton's* share only; they had not the power of selling the whole; and they have suffered six

(a) Ambler 77.

(b) 2 Vern. 202.

years to elapse before they file this bill. The statute of limitations may have barred the debt, or the party may have become insolvent. This shews how inconvenient it would be to encourage bills of this description. There is no doubt but that a debt is assignable in equity; but the question is, whether the court will enforce a contract for such an assignment, or will leave the party to his remedy at law. At law a plaintiff must shew that he was entitled to the property at the time of the sale, and he will not be permitted to support it by subsequent acts; so that if the plaintiffs had been left to their legal remedy, having no title at the time of the sale, they would not have recovered any damages. Will this court then enforce a contract upon which you cannot recover at law?

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But supposing the Court should think proper to decree a specific performance in this case, the next question is,—can the plaintiffs make a good title? In the case of lands, the Court directs the vendor to make a title to the purchaser. All that it can decree in this case is, that the defendant shall have a power to sue in the name of the plaintiffs; but that would be good for nothing, as the plaintiffs might release at any time. It is said this might be obviated by the insertion of a covenant, but that would be of no use; the court could not decree the specific performance of such a covenant: *Pourtales* is not a party to this suit; and besides that, he resides generally at *Paris*.

Mr. *Dauncey*, in reply.—The defendant has stated, in his answer, that he has always been ready and willing to perform the agreement on having a good title made to him, so that he has waived all objections arising from the insufficiency of the plaintiff's title at the time of the contract. The real question therefore, is, not whether a valid assignment was given afterwards by *Pourtales*, but whether this be a contract which a court of equity will en-

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force. One objection urged by the defendant is, that the court cannot interpose, because the debt may not now be recoverable, or because the parties may have become insolvent: but the defendant has been the cause of the delay himself; and that he was aware of the risk is evident, by his purchasing the debt at 52*l.* less than it was really worth. These objections, therefore, are not material; the real objections are, that the court cannot entertain the suit at all, and that no case has been cited which at all warrants the court in interfering. But a case has been cited which establishes all we want: *Buxton v. Lister* (a) admits the principle, that in certain cases the court will entertain suits for the specific performance of an agreement for the purchase of chattels; so that the question is, whether there is any thing in this case to exclude it from that principle. It is said, the Court cannot interfere, because there is no case of any bill for the specific performance of an agreement as to the assignment of a debt; but that objection will apply to every new case. In *Buxton v. Lister*, the Court said it was a new case; but they entertained it, and that upon the principle mentioned. I admit there is no specific case where a contract for the assignment of a debt has been enforced; but I contend that such a case is completely within the principle mentioned. It is admitted that the assignment of a debt is good in equity, and no inconveniences have been pointed out as likely to result from enforcing an agreement for such an assignment. This case cannot be distinguished from that of *Buxton v. Lister*. As to the cases referred to respecting agreements for the transfer of stock, they all arose out of the *South Sea* bubble, which was a fraud throughout, to which the Court would not lend its aid.

LORD CHIEF BARON.

I do not remember any case of this description before.

(a) *Ante*.

I am perfectly inclined to yield to the decisions which have been cited on the part of the defendant, but have great doubt whether the present does not fall within the exceptions. With respect to the objection that the plaintiffs had no title at the time of the contract, that has been waived by the subsequent conduct of the defendant. The agreement was made in 1806, through the medium of Mr. *Milne*, as agent for the defendant. He agreed to give 500*l.* for the purchase, which was certainly a tolerably fair consideration for the debt, considering that there was some doubt respecting it; and indeed the consideration has never been objected to. The only objection which has been made to this purchase by the defendant is, the want of title; and the defendant says, that if the plaintiffs can make a good title, he has no objection to complete his contract. At present, the plaintiffs are in a situation to make a good assignment; so that there can be no difficulty as to that part of the case. The only question, therefore, is, whether the court will entertain a suit for a purpose of this description or not. This contract is not for the payment of money, but to do that which will enable the defendant to recover the money; and this I think brings the case within the exception which has been pointed out. It is a contract which was to be made complete by some subsequent act. (a)

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(a) The cases relating to the interference of courts of equity, to compel the specific performance of contracts relating to chattels, have depended so much upon their own particular circumstances, that it is difficult to collect from them any precise distinctions. It seems, however, to be established that the courts will not entertain a suit of this nature, where compensation can be made in damages; and, therefore, in general, in cases of contracts for chattels, or which relate to merchandize, they will leave the parties to their remedy at law, *Buxton v. Lister*, 3 Atk. 383. *Cudd v. Rutter*, 1 P. Wms. 570. *Cappur v. Harris*, Bunb. 135. *Dorrison v.*

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I do not, however, see how I can direct a complete assignment of this debt, without having some proceedings before the deputy remembrancer: the assignment must

Westbrooke, 2 Eq. Ca. Ab. 161. Pl. 8. 5 Vin. Ab. 540. Pl. 22. S. C. *Nutbrown v. Thornton*, 10. Vez. 161. *Mason v. Armistage*, 13 Vez. 37. Where, however, the party wants the thing in specie, and cannot have it in any other way, the suit will be entertained, *Errington v. Aynesly*, 2 Bro. C. C. 343. 10 Vez. 163. as in the case of the title deeds of an estate, or of an heirloom, *Pusey v. Pusey*, 1 Vern. 273., or a curious relique of antiquity, *Duke of Somerset v. Cookson*, 3 P. Wms. 390. in which cases the Court appears to have acted upon the probability that a jury would not have those feelings which might enable them to form a correct estimate of the value of the article. Vide etiam *Fells v. Read*, 3 Vez. 70. *Lloyd v. Waring*, 6 Vez. 773. And indeed it seems, that wherever nothing can answer the justice of the case but the enjoyment of the particular article stipulated for, the court of equity will lend their aid, as in the case put by Lord Hardwicke, 3 Atk. 384. of a ship's carpenter

purchasing a large quantity of timber, where, by reason of the vicinity of the timber, nothing could answer the justice of the case but the specific performance of the contract. Vide also the *Duke of Buckinghamshire v. Ward*, cited *ibid.* and Toml. Pl. 581. *Lady Arundel v. Phipps*, 10 Vez. 139. *Nutbrown v. Thornton*, ante. It does not however appear, that courts of equity will lend their aid to enforce agreements for the sale of a business, or of the good will of a trade, *Bozon v. Farlow*, 1 Merivale, 459. Sed vide *Cruttwell v. Lye*, 17 Vez. 335. There appears to have been considerable difference of opinion, as to whether the Court will or will not enforce the specific performance of a contract to build. In the *City of London v. Nash*, 3 Atk. 515. 1 Vez. 12. S. C. Lord Hardwicke said, the plaintiffs were clearly entitled to come into court for a specific performance of a covenant of this description. And in *Allen v. Harding*, 2 Eq. Ca. Ab. 17. a similar opinion was entertained by the Court; but in

be prepared by him. I must also refer it to him to enquire whether there be any such debt or not: I can only say, that the defendant must take the debt, provided there be a debt to take.

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Decree for plaintiffs. (a)

Lucas v. Commerford, 3 Bro. C. C. 166. Lord *Thurlow* is reported to have said that there could not be a decree of this nature; and in *Errington v. Aynesley*, ante, Lord *Kenyon* M. R. said there was no case of a specific performance of a covenant to build a house; because, if A. will not do it, B. may. Lord *Rosslyn*, however, appears to have conceived that there could be no difficulty in enforcing a covenant to build, provided the terms of it were sufficiently certain; but that a general covenant to lay out a certain sum in a building of a certain value could not be specifically enforced, *Moseley v. Virgin*, 3 Vez. Jun. 184. But whatever doubts may exist respecting covenants to build, it seems to be decided that a covenant to repair cannot be specifically carried into effect

by a court of equity, *City of London v. Nash*, ante. *Flint v. Brandon*, 8 Vez. 159. *Rayner v. Stone*, 2 Eden 128. Wherever a contract is incomplete, and leaves something to be done before the party can resort to his legal remedy, the courts of equity will interfere, vide *Buxton v. Lister*, and *Wright v. Bell*, supra. They will also interfere upon the principle upon which they entertain bills *quia timet*, to compel the specific performance of a covenant of indemnity, *Pember v. Mathers*, 1 Bro. C. C. 52. Lord *Ranelagh v. Hayes*, 1 Vern. 189. and upon the same principle they will interfere in the case of a counterbond given to a surety, by compelling the principal to pay the debt when due, even though the surety be not molested, *ibid.* 190.

(a) The decree was not entered when this sheet went to press; the following, however,

is a copy of the minutes in the register's book:—

Wednesday, 21st January,

Decree.

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1818.—Refer it to the deputy remembrancer, to enquire whether the debt of 55*l.* 14*s.* 1*d.* did exist at the time of the contract in the pleadings mentioned, and whether the plaintiffs had power to make an assignment thereof, and at what

time. In case he shall find that an assignment could be made, then it is referred to the deputy remembrancer to settle an assignment in case the parties differ; costs and further directions reserved.

Hilary Term,
Jan. 26, 27.
Feb. 3.

DRAKE, Clerk, v. SMITH and Others.

Parol evidence of uninterrupted payment as far back as living memory could reach, of a modus of 8*d.* per acre in lieu of tithe hay not rebutted by terriers, stating the vicar to be entitled to tithe hay, or a modus of 8*d.* per acre in lieu thereof.

Parol evidence as far back as living memory could reach of the uninterrupted payment of a sum of 5*s.* by the occupiers of land in a certain district in lieu of the tithe of hay throughout such district, rebutted by terriers stating the 5*s.* to be payable in lieu of hay grown in *crofts* only.

The same species of parol evidence of payments in lieu of a variety of other articles rebutted by terriers in which those articles are mentioned as belonging to the vicar.

THE plaintiff in this case was vicar of the parish of *Warmfield*, in the county of *York*; and claimed by his bill the tithes of all the titheable matters within the parish, both great and small, except one moiety of the tithe of corn and grain.

The defendants were the occupiers of lands within the parish, and set up the several moduses after-mentioned.

The parish was divided into four townships, or hamlets, viz. *Warmfield*, *Kirkthorpe*, *Heath*, or *Warmfield cum Heath*, and *Sharlston*; and one of the moduses set up by the defendants' answer was 8*d.* per acre, for hay produced within the townships of *Warmfield*, *Heath*, or *Warmfield cum Heath*, and *Kirkthorpe*; another modus set up by the answer was 5*s.*, payable yearly by every occupier of land or tenements within the township of *Sharlston*, in lieu

of the tithe of hay throughout such district, rebutted by terriers stating the 5*s.* to be payable in lieu of hay grown in *crofts* only.

The same species of parol evidence of payments in lieu of a variety of other articles rebutted by terriers in which those articles are mentioned as belonging to the vicar.

of the tithe of hay grown and cut upon and off the lands within such township. The other moduses were parochial, viz. 1*d.* in every year at *Lammas*, for every sheep shorn within the parish, in lieu of the tithe of wool; 3*d.* per head in every year at *Lammas*, as a modus in lieu of the tithe of lambs yeaned in the parish in every year; 2*d.* at *Lammas* in every year for every milch cow within the parish, in lieu of the tithe of milk and calves; and the sum of 10½*d.* at *Easter* in every year, for the occupiers of every ancient messuage within the parish, called *house dues*, in lieu of the titheable matters grown and produced within the ancient gardens and orchards of and belonging to such messuages, and for and in lieu of the tithes of eggs and poultry produced in the yards, gardens, and orchards, belonging to such ancient messuages, and for and in lieu of the tithes of young pigeons, produced in the yards, gardens, and orchards, belonging to such ancient messuages.

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The Earl of *Westmoreland* claimed to be entitled to the tithes of corn, grain, pease, beans, and pulse, within the township of *Sharlston*, under a grant from *Henry VIII.*, and was therefore made a party to the suit; but no evidence being produced with respect to his claim, the bill as to him was dismissed.

The plaintiff's general right to the tithes claimed by the bill was sufficiently established by the evidence.

In support of the several moduses set up by the answer, the defendants' counsel read the depositions of several witnesses, which established the payment of them to the vicar, as far back as living memory could reach. They also read the receipts of former vicars for the moduses as far back as the year 1777: to rebut this evidence, the plaintiff's counsel read the endowment of the vicarage dated 1253, which mentioned, that the vicar was

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to receive "the profits of the alterage, and the tithes of the water-mills of this town, with the tithes of hay of the same, and also a moiety of the tithe of corn of this town, *Cuckthorpe*, (*Kirkthorpe*). (a) They also read an extract from the ecclesiastical survey, 26 *Hen. VIII.* 1535, which, speaking of *Warmfield*, says, "the vicarage there is valued in a mansion, 3s. 4d.; tithe grain one year with another 3l.; tithe lamb and wool 16s.; tithe hay 3s.: oblations commonly 13s. 4d.; minute and privy tithes 20s.; in the whole, one year with another, 5l. 12s. 8d." The plaintiff's counsel likewise read an old terrier, dated in 1693, and which was entered in a parochial register, commencing in 1652, in which it was mentioned, "that one moiety of the tithe of corn, and all other tithes great and small, except the other moiety of corn tithes, belonged to the vicar." They also read another terrier dated in 1716, which mentioned, that "the vicar was entitled to the tithe of hay, or a modus of 8d. per acre for all hay within *Warmfield* heath and *Kirkthorpe*; but that in *Sharlston* only 5s. per year for all the hay in their crofts, and nothing for all other hay, except herbage; also all wool, and lambs, pigs, geese, ducks, apples, plumbs, &c.; also the tithe herbage for unprofitable cattle, within the townships of *Warmfield Heath* and *Kirkthorpe*." Two other terriers dated in 1743, and 1748, were also read, in which were entries to the same effect. From an entry made in the before-mentioned parochial register, and signed by a former vicar of the name of *Leake*, dated 1668, which was also read; it appeared that the vicar in that year gathered hay in kind of three persons, and agreed with the rest at 1s. 4d. and 1s. 2d. and 1s. per acre: but by an interlineation, which appeared to be written by a different hand, it was stated, that "this was overruled by a commission in the exchequer, and brought to 8d. per acre." Another terrier dated in 1764, after

(a) Burton's Monastical history of *Yorkshire*, 308.

stating to the same effect as that of 1716, contained the following notice of the moduses there mentioned, and this memorandum, viz. " what these moduses are founded upon is not known at present : it appears by a memorandum entered into the register book by Mr. *John Leake*, formerly vicar, that he took hay in kind from some of the inhabitants of *Warmfield* in the year 1687, and had agreed with others for 1s. 2d. 1s. 4d. and 1s. per acre ; but that agreement was overruled in the Court of Exchequer, and reduced to 8d. per acre." It appeared also from the depositions in the cause, that a search had been made amongst the records of the court for the commission mentioned in the memorandum, but that it had not been found. The rest of the plaintiff's evidence consisted of terriers of the years 1770, 1777, 1781, 1786, and 1809, all of which were to the same effect with that of the year 1716. That of 1809, however, contained in addition the following entry :—" In lieu of tithe wool and lamb, there has been paid to the *late* vicar 1d. for each fleece of wool, 3d. for each lamb, and 2d. for each milch cow." This terrier was not signed by the vicar ; and many of the inhabitants who signed it were defendants to the present suit.

Mr. *Dauncey* and Mr. *Barber* for the defendants, the occupiers, insisted, that these moduses were well laid in the answer, and sufficiently established by the evidence. In support of the modus of 3d. for the tithe of lamb they cited *Bertie v. Beaumont* (a), in which an issue had been directed in the case of a similar payment. And in support of the hay moduses they cited *Hardcastle v. Smithson* (b), *Shelden v. Montague* (c), *Cooper v. Andrews* (d), *Scarr v. Trinity College* (e), and *Clayton v. Trinity College* (f).

(a) 2 Price 303.

(b) 3 Atk. 245.

(c) Hob. 118.

(d) Ibid. 39. 4.

(e) Gwill. 1445. 3 Anstr.

760. 4.

(f) Gwill. 1459, and Anst.

841.

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Mr. *Martin* and Mr. *Simpkinson* for the plaintiffs.—The first modus cannot be objected to, supposing the evidence be sufficient to support it. As far as the parol testimony goes it is certainly established; but the documentary evidence disproves the immemoriality. The ecclesiastical survey notices the tithe of hay, and says the value of it is 3s. Now though a survey of this kind is not conclusive as to the value, yet it proves that at the time it was made the tithes were paid in kind:—if not, how could they have been valued at that sum? This applies, with, still greater force, to the *Sharlston* modus. The endowment also states the vicar to be entitled to these tithes. The first doubt thrown on the subject is, by the terrier of 1716, which puts it in the alternative. But we shew that at the time of the survey it was impossible the modus could have existed according to the value then set upon the tithe. It appears also that in 1668 the vicar actually took the tithe in kind from some of the inhabitants, and compounded with others; and in 1693 a terrier is entered in the register which gives the vicar all the tithe of hay, and contains no notice whatever of any modus: in that respect the present case resembles *Mytten v. Harris* (a). With respect to the commission said to have been issued out of this court, it is to be presumed that, if any such had existed, some of the subsequent terriers would have noticed it: but that does not rest on presumption; the records of the court have been searched, and no notice of such a proceeding can be found. But allowing the utmost force to this entry, respecting the commission it merely says, that the Court reduced the agreement to 8d. an acre, and establishes nothing in favour of the defendants.

With respect to the *Sharlston* modus, that rests on different grounds. It is laid as a modus payable by all the

occupiers of lands in the township, whether they grow hay or not; so that any persons occupying arable land, or any other land, without growing hay, are to pay this modus. Is it probable such an agreement could ever have been entered into? But supposing the modus to be well laid, the next question is, is it well proved? With reference to this modus, the ecclesiastical survey is very strong. The tithe of hay throughout the whole parish is estimated at 3s. only;—now if this modus had existed, is it probable the commissioner who made the survey would have fixed the value of the hay at so small a sum? But, supposing such a payment did exist, the terriers confine the modus to crofts; which are small inclosures contiguous to dwelling houses. The defendants should have shewn that all the meadow lands in the township were formerly ancient crofts: but they have not proved that a single acre ever was of this description.

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The other moduses are all parochial; but they are not supported by the evidence since all the terriers give the vicar the tithes of the several articles said to be covered by them, except that of 1809, which mentions a payment of 1d. for tithe wool, and 3d. for lamb; but that terrier is signed only by the churchwardens and inhabitants, and only mentions the payment as having been made to the preceding vicar: it is in fact a recognition of the right of the vicar to this tithe in kind, and it is signed by five of the present defendants.

With respect to the modus of 3d. for a lamb, it is not denied that there are cases in which courts of equity have directed issues upon moduses of 3d. for a lamb; but there are many cases the other way. Lord *Thurlow* is reported to have said, he never would direct an issue to try such a modus as this. Where there are conflicting cases, the Court, before it decides to which it will lean, will weigh well the reasons upon which those decisions

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are founded. It is said this is a mere question of fact, and that all questions of that nature should be sent to a jury. That proposition, however, is laid down too broadly: courts of equity have the power of deciding upon questions of fact as well as courts of law; and issues are only directed where, in consequence of doubts arising from conflicting testimony, courts of equity find it necessary to resort to that mode of proceeding for their own information. There are cases in which courts of law have acknowledged the authority of courts of equity in this respect, as in *Pyke v. Dowling* (a). But supposing this *modus* were to be sent to a jury, is there any judge who would not feel it his duty to tell the jury, that it is impossible the value of a lamb, at the time of *Richard II.*'s return from the holy wars, could be 2s. 6d.? In *Askew v. Green*, Lord *Manners*, who sat in this court when it was decided that a *modus* of this nature should be sent to an issue, afterwards tried the cause; and told the jury that it was impossible such a *modus* could be good in law, and directed them to find a verdict accordingly.

[LORD CHIEF BARON.

The case of *Askew v. Green* was a very particular case, and I hope it will never occur again. When this Court sends a case for the opinion of a jury, it does not expect it to be sent back again with the opinion of the judge; it might as well be decided here. I recollect in the case of *Raine v. Smith*, which occurred on the northern circuit, Mr. Justice *Rooke* thought a *modus* upon which an issue had been directed by this Court was illegal, and directed the jury accordingly: but the Court, upon a motion for a new trial, sent it back again, saying, they did not want the opinion of the judge, but of the jury.]

(a) 3 Gwill. 1166. 2 Bl. Rep. 1257, S C.

Mr. *Dauncey*, in reply.—We have at least ten good witnesses, who prove the payment of these moduses as far back as living memory can go. They also speak of reputation amongst former occupiers, which, according to a late case, is admissible evidence. In the case of *Oakham* school, the Court directed an issue where the payment was proved for thirty years only: the defendants are also assisted in their case by the evidence on the other side. The entry in the register, which has been read on the part of the vicar, shews that an attempt was made by Mr. *Leake* to raise the payment which was ineffectual; and all the subsequent terriers recognize the payment of the 8*d*. With respect to the *Sharlston* modus, in *Hardcastle v. Smithson* (a), the modus was laid in the same manner. The entry in the ecclesiastical survey must be erroneous; it is impossible that all the hay in the parish could be worth only 3*s*. There are many cases in which the courts have not attended to documents of this description: the plaintiff's own evidence proves that the payment of 5*s*. was made; and our evidence proves that it was made for all the hay in the township, and not for that in the croft only. It is quite clear the terriers are not correct, since they differ from each other. In *Mytton v. Harris* (b), the terriers expressly stated the tithe to be payable in kind. At all events, to induce the Court to decree an account, the vicar's case ought to be perfectly clear: but here it is very doubtful; the Court, therefore, will direct issues.

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LORD CHIEF BARON.

This is a bill filed by the Rev. Mr. *Drake* against Mr. *Smith*, and other defendants, for several species of tithes. Lord *Westmoreland* has been made a party to the suit, as owner of a portion of the tithes: but there is no case

Feb. 2.

(a) Ante.

(b) Ante.

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made out against him ; and the bill must, therefore, be dismissed, as against him, with costs.

The plaintiff claims tithes throughout the whole parish ; and the parish is divided into four townships, three of which are in the occupation of some of the defendants, and those defendants set up a modus of 8*d.* per acre in lieu of tithe of hay. The other defendants occupy the other township of *Sharlston*, and insist on a modus of 5*s.* for the tithe of hay in that township. All the defendants unite in insisting on three parochial moduses, viz. 1*d.* for every sheep shorn in the parish, in lieu of the tithe of wool ; 3*d.* for every lamb ; 2*d.* for milch cows ; and 10½*d.* called house dues, alleged to be payable in lieu of all other titheable matters grown and produced in the parish. I have looked through the evidence with all the care I could, and cannot find any instance of tithe in kind having been rendered for any of these articles. The defendants have also proved the money payments for a considerable time back ; consequently, the burthen is thrown upon the plaintiff of getting rid of the impression made by their evidence.

With respect to the 8*d.* alleged to be payable for the tithe of hay in the townships of *Warmfield*, *Heath*, and *Kirkthorpe*, it is said that the ecclesiastical survey is inconsistent with such a modus ; and certainly, if the ecclesiastical survey were entitled to any degree of credit, I should incline to the same opinion ; but I have had experience enough to teach me that no great reliance is to be placed on documents of that description. The parish register is then produced : it is not, properly speaking, a terrier, but a book which, being kept in the parish chest, and the property of all the parishioners, is admissible as evidence. This book contains an entry dated in 1693, purporting to be a terrier ; which entry says, that one moiety of the tithe of corn, and all other tithes, great and

Ecclesiastical
survey not to
be relied
upon.

small, except the other moiety of corn tithes, belong to the vicar. If I pay any regard to the subsequent documents, I cannot say that this document is entitled to that weight which the counsel for the plaintiff have given to it: I think it was intended merely to mark the distribution of the tithe, and not the manner of rendering it; and that if any presumption could arise from it, in favour of the vicar, such presumption would be overthrown by the subsequent instruments, which have been produced. In addition to this, there is in the same book an entry which completely militates against such a presumption. The memorandum which has been read, after mentioning the payments for the tithe of hay, says, "those sums were afterwards reduced to 8*d.* per annum:" this entry, connected with the actual payment of the 8*d.*, which has been proved for so long a period, forms a very important feature in the case; the vicar himself signs the book, and calls it a *modus* for tithe of hay. It is evident, therefore, that it was a *modus*; for he calls it so in opposition to the composition stated in the book. The other terriers are all in the same terms with that of 1764, with the exception of the memorandum: they are all signed by the vicar and other necessary parties, and they all say that there is a *modus* of 8*d.* throughout these townships for the tithe of hay; and this 8*d.* is proved to have been invariably paid, and to have been paid as a *modus*. An issue must, therefore, be directed as to this *modus*.

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With respect to the *modus* of 5*s.* alleged to be payable for *Sharlston*, that stands upon a different ground. The *defendants, by their evidence, certainly make out a good *prima facie* case; but, according to their case, the 5*s.* is payable for all the hay in the township. The terriers, however, confine it to hay grown in the crofts. These instruments must be considered as declaratory of the vicar's right; they are as correct in point of form as any terriers I ever saw, and constitute a complete chain of

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evidence from 1716 to 1809. There is no mention of this payment of 5s. in the entry in the register; the first mention of it that occurs is in the terrier of 1716; it is there said that 5s. is payable for all the hay in their crofts, but nothing is said about hay growing elsewhere. That certainly confines the payment to hay grown in crofts. It is observable, that the first payment of 8d. is payable for all the hay in the other township, but here it is limited to the crofts; all the other terriers are in the same form. I am convinced therefore that this payment of 5s. is applicable only to hay grown in crofts. The terriers also state a *non decimando* as to the rest of the hay, and that renders the case more clear. For these reasons I think this *modus* cannot be supported, and must decree an account of the tithe of hay in *Sharlston*.

The other payments set up by the defendants are parochial. Except those called the house dues, which are payable at *Easter*, they are all laid as payable at *Lammas*. The parol evidence supports these payments; and so do the receipts, but they are certainly of modern date. Here also we must refer to the terriers: that of 1716 is negative evidence of the non-existence of these *moduses*, for it mentions wool, lambs, pigs, geese, ducks, apples, plums, &c. as part of the tithes due to the vicar. I never saw any terrier which mentioned the tithes of particular articles as being payable, unless the tithes of those articles were payable in kind. The terrier of 1716 is followed by others all in precisely the same words, and all signed by the churchwardens and principal inhabitants. The terrier of 1809 is a written declaration by the parish that the vicar is entitled. It is voluntary on the part of the parish, the vicar not having signed it. The entry in this terrier respecting the payments to the late vicar, in lieu of the tithe of wool, &c. is a strong declaration of the vicar's right to the tithes in kind, since it affords a clear explanation of the origin of the money

payments, and shews that they were made in consequence of some arrangement with the former vicar. This circumstance is very strong indeed; and, connected with the other terriers, which are equally strong, operate, I think, as a complete declaration of the right of the vicar to the tithes of these articles in kind. As to the payment of the 10½d., that covers several matters mentioned in the terriers, in addition to which there is no allusion in any of them, as to any of the small tithes being covered by these payments. I think, therefore, these moduses cannot be supported, and that there must be an account taken of the matters alleged to be covered by them.

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I have been very much pressed as to the modus for lambs; but have no difficulty in declaring my firm opinion to be, that a court of equity is as much bound to decide on questions of fact as a jury; and, therefore, if I were to see a payment attempted to be set up of 1s. for a lamb, I should feel bound to decide that it is a rank payment. With respect, however, to the present modus, I must say, that although my private opinion may be that it is rank, yet I must send it to a jury, and I will tell you why:—when I see a modus of 3d. for a lamb, I know that was a great price at the period when this must be supposed to have originated; yet still it is not such a price as may not have been given for it that time. There is a great difficulty in ascertaining what the value of any particular article was at the time of *Richard II.* The value of a lamb may have been different in different parts of the kingdom, as is the case at the present day. Although the price is certainly large for that period, yet it is not so large but that it is possible a lamb may in some places have produced that sum; and therefore the best way is to leave it to a jury, who from reference to the state of cultivation, or of luxury at the time, may have much better opportunities of ascertaining the fact than I can have at this moment.

Modus of 3d.
for a lamb
not too rank
to be sent to
a jury.

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Let there be a decree for an account with costs, as to all the tithable matters prayed by the bill, except hay in the townships of *Warmfield Heath* and *Kirkthorpe*, respecting which there must be an issue to try the modus set up by the answer.

Jan. 28, 29.

WILMOT, Clerk, v. KELLABY and Others.

The Court will not direct an issue in favour of a rector where a defendant sets up an opposite title which he proves to the satisfaction of the Court.

THE plaintiff was rector of *Trusley*, in the county of *Derby*; and instituted the present suit against the defendants, who were the owners and occupiers of lands within certain districts called *Grangefield* and *Mansfield*, for an account of tithes.

The defence set up by some of the defendants was, that the lands in their occupation were formerly part of the lands and possessions of the dissolved abbey of *Croxden* in the county of *Stafford*; and that after the dissolution of monasteries in the reign of *Henry VIII.* the lands and possession of such abbey, together with all tithes and ecclesiastical dues, were granted by letters patent unto *Thomas Fytche* and his heirs, and had ever since been enjoyed by the owners of such lands for the time being, whereby the tithes and dues became, by unity of possession, merged and extinguished.

The other defendants set up a similar defence as to the lands in their occupation, which were situate in a certain district called *Nunsfield*, or *Nunfield*, and had formerly belonged to the dissolved priory of *Kingsmeade*.

The defence thus set up by the defendants was supported by a variety of terriers, and by evidence of constant non-payment of tithes to the rector. The plaintiff

rested on his rectorial right; and produced no evidence to impeach the defendant's case, which was held by the Lord Chief Baron to be sufficiently established.

1818.

WILMOT
v.
KELLABY.

Mr. *Martin* and Mr. *Dowdeswell*, for the plaintiff, insisted on the rector's right to an issue.

Mr. *Dauncey*, Mr. *Cooke*, Mr. *Wingfield*, and Mr. *Phillimore*, for the defendants, contended, that where a defendant sets up a grant of tithes supported by a constant non-payment of them to the rector, which case is met by no opposite testimony, the rector is not entitled to an issue; and cited *Barker v. Barker (a)*, *Scott v. Airey (b)*, *Strutt v. Baker (c)*.

LORD CHIEF BARON.

Nothing can be more clear than this is against the rector: I must confess, however, that hitherto I always thought a rector was in all cases as much entitled to an issue as an heir at law; but the cases which have been cited cannot be got over.

Bill dismissed.

(a) 1 Wightwick 397.

(c) 4 Gwil. 1430.

(b) 3 Gwil. 1174.

ATTORNEY GENERAL v. FREEMAN and Others.

February 5.

ELIZABETH *Wilks*, by her will dated the 16th December, 1813, after giving several specific and pecu-

Bequest of money to trustees to pay the in-

terest and dividend to the poor of a certain parish.—*Held*, not within the meaning of a local act of parliament, which vested all estates and monies held in trust for the benefit of the poor of the parish, and not otherwise, specifically appropriated in the guardians of the poor in that parish.

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niary legacies, gave and bequeathed "all the rest of her money and securities for money to the defendants, in trust, to lay out the same, and pay the interest and dividends to the poor inhabitants of the parish of *St. Luke*, in the county of *Middlesex*, for ever, by half yearly payments; and directed that, in case of the death of either of her trustees, the survivor should appoint other trustees in the parish, and so from time to time, as often as the trustees so to be appointed should by death or resignation be reduced to two after the death of the trustees thereby appointed." The present suit was instituted for the purpose of carrying the will of the testatrix into execution; and by a decree made on the hearing of the cause, it was referred to the deputy remembrancer to take the usual accounts of the testatrix's personal estate, and of her debts and legacies.

Amongst other charges carried in before the deputy remembrancer under this decree was, one by *John Wilks*, as clerk to the guardians of the poor of the before-mentioned parish of *St. Luke*, by which it appeared, "that by an act of parliament passed in the 48th year of the reign of his present majesty, intituled, "an act for making more "effectual provision for maintaining, regulating, and "employing, the poor of the parish of *St. Luke*, in the "county of *Middlesex*," the management of the poor of the said parish, and the execution of the several powers given by that act, and by certain acts of parliament therein recited, were invested in forty-eight vestry-men of the said parish, to be chosen in the manner therein directed; and in the rector, churchwardens, and overseers, of the poor of the said parish, for the time being, under the denomination of "the guardians of the poor of the said parish;" and that, by the said act of parliament, directions were given for choosing a clerk to the said guardians of the poor, and also for the appointment of a treasurer or treasurers to the said guardians of the

poor : and that it was by the said act enacted, that the estates and effects held in trust for the parishioners or vestrymen of the said parish, or for or towards the benefit of the poor thereof, should be absolutely vested in, and possessed by, paid and delivered, and belong to, the said guardians of the poor and their successors. And it was thereby further enacted, that all gifts, donations, benefactions, and sums of money whatsoever, then payable, or which should thereafter become payable, for and to the use of the poor of the said parish, not being directed or liable to be applied for the support of any private or particular poor or charity, or by the respective donors, or otherwise particularly appropriated, and not being sacramental money, should from time to time, from and after the appointment of the said guardians of the poor, be paid into the hands of their treasurer or treasurers for the time being, for the use of the poor of the said parish, to be applied in aid of the rate for the relief of the poor thereof, unless the said guardians should think proper from time to time to appropriate and apply the same, or some part thereof, to and in relieving or assisting any indigent, aged, or industrious parishioners, who had not become chargeable to the said parish. And that it was thereby also enacted, that the guardians of the poor to be appointed under that act, should and might sue, and be sued, in the name or names of their clerk or clerks, for the time being, under that act; and that no action or suit which might be brought by or against the said guardians of the poor, or any of them, in relation to the said act, in the name of their clerk or clerks, should abate or be discontinued by the death or removal of such clerk or clerks, or by the act of him or them, without the consent of the said guardians of the poor : but that the clerk or clerks for the time being should always be deemed plaintiff or plaintiffs, defendant or defendants, in every action or suit as the case might be.—The said *John Wilks*, as clerk to the

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said guardians of the poor of the said parish, therefore charged, that all such part of the residue of the estate of the said testatrix, as to the deputy to his majesty's remembrancer of this court should appear to consist of money, and securities for money (not being due on mortgages or her general personal chattels) belonged, and should be paid, assigned, or transferred, to the treasurer for the time being, of the said guardians of the poor of the said parish, to be by them, the said guardians of the poor, appropriated and applied according to the directions of the said act.

The deputy remembrancer, by his report, stated, that he had disallowed this claim; and his report in this respect was excepted to, on behalf of the said *John Wilks*.

The cause now came on to be heard on this exception, and on further directions.

Mr. Dauncey and *Mr. Shadwell*, in support of the exception, contended, that the gift made by the testatrix of the interest and dividends of her residuary estate, to the use of the poor of the parish, was within the meaning of the act. That it did not come within the exception of monies appropriated to any particular purpose, since the word appropriation in the act must mean an appropriation to particular persons who were to enjoy the benefit. That the money being given to trustees was not such an appropriation, the trustees being merely the conduit pipes, to transmit the money to the poor who were the actual objects of the bequest. That if there were any doubt as to the construction of the claim, the court could not consult the interest of the poor better than by giving the money to the persons appointed by the act, since they were a corporate body, and therefore much better qualified to execute the trust than individuals could be.

Mr. *Jervis*, Mr. *Martin*, and Mr. *Richards*, on the other side were stopped by the

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How can I allow this exception? It is nothing more than an attempt to set aside a will made by a testatrix, giving her property to persons of her own appointment, for the purpose of distributing it in charities. She has, in fact, appointed a permanent body of men to conduct the business. How can I take it out of their hands for the purpose of giving it to the guardians of the poor under this act? it would be most injurious to the parish, if I were to transfer to these guardians the confidence she has reposed in other persons. There can be no doubt but that this is an appropriation within the meaning of the act.

Exception overruled.

JENKINSON, Clerk, v. ROYSTON, and Others.

Jan. 15, 16,
17. Feb. 10.

THIS was a bill filed by the plaintiff as rector of *Leocrington* in the county of *Cambridge*, against several occupiers of lands within the parish, for an account of the tithes of a great variety of articles. The defendants, by their answer, alleged, that by the custom of the parish every householder and inhabitant within the parish was to resort at *Easter* to the church or parsonage house, and there to reckon and pay as follows:—

The patron and ordinary are necessary parties to a bill to establish a modus; and therefore where the defendants insisted on several moduses and customs which were

in themselves bad, but were established by a decree made in a suit in this court, to which the patron and ordinary were not parties, the court refused to allow them, and decreed an account.

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For grounds mown between the sea dyke and cattle dyke 2d. per acre; and in *Flanfield* 1½d. per acre.

For all grounds mown between the high fen dyke and cattle dyke, 1d. per acre, for and in lieu of all hay grown and cut within the said places.

The answer then set up the following payments as moduses: for every foal one penny; for every milch cow 2d.; and for every heckforth, or heifer, that had yielded but one calf 1d. for and in lieu of milk, and all profit arising by such cow or heifer except the calf.

It then stated, that by the custom of the parish calves in kind were to be delivered at the will of the owner after they were three weeks old, and at such time of the year as the owner might think best to spare them, not hindering his breed; and if the parson delayed the fetching, he was to pay for the keeping.

That lambs in their kind were to be delivered the first day of *May*; and if any person had under seven lambs, he was to pay for every lamb a halfpenny; and if he had seven lambs and under ten, he was to pay one lamb, and to be allowed for every lamb that wanted of the ten a halfpenny; and so likewise for any odd number of lambs; and so likewise for calves. But that if any person had under seven calves, or an odd number of calves under seven, and sold any of them to the butcher, he was to pay to the parson the tenth part of the money which they were sold for.

That tithe of lambs was to be paid in kind, as well those that fell after as those that fell before the first of *May*, respect being always had to the number of lambs, according and pursuant to the above prescription or modus, save that those that fell after *May-day* were to be kept by the

owner until a month old, and if longer he was to be paid for keeping; and so of lambs that fell within a month before *May-day*, which were to be kept by the owner until a month old, and if longer he was to be paid for keeping.

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That pigs in their kind were to be delivered at the will of the owner after they were nine days old; and if the parson delayed the fetching thereof; he was to pay for the keeping; afterwards as reason should require, or the parties could agree.

That geese in their kind were to be delivered before *Midsummer*; and if any person should have under seven pigs or geese, he was to pay for every pig or goose a halfpenny; and if he should have seven and under ten, he was to pay one, and to be allowed for them that wanted of ten a halfpenny a-piece for every one, and so of any odd number of pigs or geese.

That of wool the tenth stone or tenth pound was to be paid presently after the sheep were clipt; and if any person sold sheep after *Candlemas* and before clipping, he was to pay for the wool for every sheep one penny, if he sold them out of the parish.

That of hemp and fumble the tenth sheaf was to be rendered, when it was pulled weathered and thrashed; and that the weathering and threshing of hemp and fumble was to be considered, deemed, and taken for and in lieu of the seed.

That for rape seed the tenth bushel was to be rendered ready dressed, the parson allowing for the dressing one penny per bushel.

That for wood the tenth tree was to be rendered, when it was felled of twenty years' growth, under which twenty

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years, if never felled before, it was to be reckoned from the first planting, but if felled before, from the last felling thereof.

That for every acre of reed ground that was broken, cropt, or mown in the year, one penny was to be paid at *Easter*.

The tithe of eggs was stated to be payable as follows, viz. for every hen or duck two eggs, and for every cock or drake either of them three eggs.

The answer then went on to state that the inhabitants were to pay to the parson yearly, for every acre of fed ground in the parish (*Throckenholt* not included) for herbage one penny, or the fall at the parson's election. For every dovehouse sixpence. For every house having an orchard or cherry ground, so as it was above half an acre of land, one shilling. For every acre of new improved ground in the marsh or fen which should be mown, two-pence; and for every such acre fed there, one penny, or the fall at the election of the parson. It then alleged, that grounds sown with clover and such like seed, for the use and purpose of feeding horses, sheep, or beast, neat or profitable, was to be accounted as feeding land, and not otherwise. And in case the parson should take the fall, then in such year he was not to have the penny per acre herbage, neither in the old grounds, or the new improved grounds.

That tithe of cole-seed, mustard-seed, and turnip-seed, upon lands tilled, plowed, or sown, or ordered to that purpose, was to be paid in the same manner and proportion as rapeseed was said to be payable.

That madder being a new improvement was to be paid in kind.

That for every mill for the grinding of corn within the

said parish, such modus or payment should be paid, as was and had been theretofore paid for the same; and that every stranger occupying any feeding grounds, or pasture, was to pay the same average for the grounds or pasture for herbage, after the custom of the field, as the inhabitants paid for mown ground, or the fall at the parson's choice.

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The defendants annexed to their answer, by way of schedule, a map, or plan, shewing the grounds between *Sea Dyke* and *Cattle Dyke*. The grounds in *Flanefield*; the grounds between *High Fen Dyke* and *Cattle Dyke*; the grounds in *Throckenholt*; and the new improved grounds in the marsh and fen mentioned in their answer. But their answer contained no allegation that any of the lands in their occupation were situated in any of those places, nor was there any evidence to that effect.

In support of the moduses, the defendants proved the payments of them by the receipts and books of the former rectors; but the evidence upon which they principally relied was, a decree made by this court in a suit instituted in the year 1695, for the purpose of establishing divers moduses and customs of tithing alleged to exist throughout the parish (a), by which the moduses and customs now set up by the defendants were confirmed. The bill in that suit was by certain of the parishioners and inhabitants of the parish, on behalf as well of themselves as of the rest of the parishioners and inhabitants of the parish, against the rector; and after stating certain customs which were alleged to exist in the parish, went on to state, that about the year 1621, divers differences about such customs had happened, which by the mediation of the judge of the *Isle of Ely*, and other justices, had been accommodated and reduced to writing;

(a) *Swaine v. Pern*, 1 Wood. 341.

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but that the defendant had endeavoured to overthrow the same; and that after several suits had been brought by him in the bishop's court; and in the court of Exchequer, which were accommodated, the parishioners about the 10th of *April* 1688, came to a further agreement of tithing, over and besides the former customs. That the rector, however, several times attempted to overthrow these arrangements; and therefore the plaintiff, for relief, prayed the aid and assistance of this court. The decree declared that the ancient prescriptions or moduses as mentioned in the agreement of 1621, and the additional agreement of the 19th of *April* 1688, should be ratified and confirmed, and for ever established by the authority of this Court, with certain alterations and explanations, which were therein set out. To this suit neither the patron nor ordinary were parties. The statements of the moduses and customs in the present answer appeared to have been copied from the decree.

Mr. *Dauncey*, Mr. *Martin*, and Mr. *Simpkinson*, for the plaintiff. (a)

The *Solicitor General* and Mr. *Boteler* for the defendants.

LORD CHIEF BARON.

Feb. 10.

The plaintiff in this case is the rector of *Leverington*, in the county of *Cambridge*: the general right of the plaintiff to the tithes of the parish is admitted, but the defendants, who are the occupiers of some lands in the parish, set up different payments in lieu of tithes in kind.

As to the three first moduses, namely, the twopence

(a) The reporter did not hear the arguments of counsel in this case.

per acre for grounds mown between the *Sea Dyke* and *Cattle Dyke*; the three halfpence per acre in the *Flanefield*; and the third modus of a penny per acre on the grounds mown between the *High Fen Dyke* and *Cattle Dyke*; it is impossible that they can be maintained in this suit; for supposing them to be decided to be good in a proper case, it is not shewn upon this record, or indeed alleged, that any of the defendants occupy any of those grounds; and it being admitted that the tithe of hay is due in general, and that only those lands are covered by a modus; unless the defendants prove that they occupy those lands, or some of them, of course they must be liable to the payment of tithes, and there must be an account of tithe hay taken. Whether if they occupy any lands thus supposed to be covered by those moduses, they will think it advisable to set up such payments as they have set up in respect of those lands, I cannot presume to say; but upon this record I must decide against them, whatever regard may be due to the proceedings in the ancient suit which has been so much relied upon. With respect to those proceedings, I shall not say any thing at present; but I will proceed to look through the moduses, as if that suit had not existed.

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ROYSTON.

Having disposed of the modus for the hay, the next modus insisted upon is "a penny for every foal:" I do not see any objection to that, provided it can be proved; and therefore there must be an issue upon that modus, in case the rector shall think proper to have one. The next modus is, "for each milch cow two-pence." I see no objection to that, "and for every heifer that hath had but one calf one penny, for and in lieu of milk and all profits arising by such cow and heifer except the calf." I confess, though a great deal of observation has been made upon the profits arising from the cow and the heifer,

Modus of the
penny for
every foal
good.

Modus of 2d.
for each milch
cow good.

Modus of 1d.
for every heifer
that hath
had but one
calf, in lieu of
milk and all
profits arising
by such cow
calf, good.

and heifer except the

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A custom that calves in kind are to be delivered at the will of the owner, after they be three weeks old, and at such time of the year as the owner thinks best to spare them, not hindering his breed, and if the parson delay fetching, to pay for the keeping, bad.

I see no difficulty in the case; the word profits may be all surplusage, but that is no objection.

With respect to calves, which is the next modus, "calves in kind to be delivered at the will of the owner after they be three weeks old; " and at such time of the year as the owner thinketh best to spare them, not hindering his breed, and if the parson delay the fetching to pay the keeping," here the calf is to be kept till three weeks old, or till such time of the year as the owner thinks best to spare them. The law in general fixes the render of the animal to the time it can live without its mother: but this rule certainly may be varied by the custom of different places. This custom, however, seems to me to be perfectly unreasonable, for if the delivery of the calf be to be at the will of the owner, that will may be determined perhaps the moment after the three weeks have expired, or at the end of half a year; and yet the parson is obliged to pay for the keeping, if the farmer choose to keep it after a certain time; I am therefore of opinion there must be an account taken of the tithe of calf.

A custom that tithe lambs should be delivered the first day of May, and that if any person have under seven lambs, he is to pay for every lamb a halfpenny; and if seven lambs and under ten, one lamb, and to be allowed for every lamb short of ten a halfpenny, and so likewise for any odd number; and that lambs falling after 1st of May, are to be kept until a month old, and if longer, the keeping to be paid for, bad for uncertainty.

The custom with respect to the lambs is stated thus: "Lambs in their kind to be delivered the first day of May; and if any person have under seven lambs, he is to pay for every lamb a halfpenny; and if he have seven lambs and under ten, he is to pay one lamb, and to be allowed for every lamb that wanteth of the ten a halfpenny; and so likewise for any odd number of lambs, and so likewise for calves," so that there are two moduses for calves: "but if any person hath under seven calves, or an odd number of calves under seven, and sell any of them to the butcher, he shall pay to the parson the tenth part of the money which they are sold for, and

short of ten a halfpenny, and so likewise for any odd number; and that lambs falling after 1st of May, are to be kept until a month old, and if longer, the keeping to be paid for, bad for uncertainty.

that tithe of lambs shall be paid in kind, as well of those that fall after as of those that fall before the 1st of *May*, respect being always had to the number of lambs, according and pursuant to the above prescription or *modus*, save that those that fall after *May-day* are to be kept by the owner until a month old; and if longer, he is to be paid for keeping:" so that if the lamb is not fit to be delivered at a month old, he is to be paid for keeping it, though he is bound by law to keep it till it is fit for delivering: "and so of lambs that fall within a month before *May-day*, which are to be kept by the owner until a month old, and if longer, he is to be paid for keeping:" really I cannot myself make any thing of this allegation of a *modus*, and not understanding it, and not seeing how it is possible to be a reasonable thing; I must consider it as a bad *modus*."

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v.
ROBERTSON.

The next is, "pigs in their kind, to be delivered at the will of the owner after they be nine days old, and if the parson delay the fetching thereof, he is to pay for the keeping thereof." The delivery at the will of the owner seems to me to be a decisive objection; this *modus* must be considered as invalid.

A custom that pigs should be delivered at the will of the owner, after they be nine days old, and that if the parson delay

the fetching thereof, he should pay for the keeping, bad.

The next is "geese in their kind, to be delivered before *Midsummer*, and if any person have under seven pigs or geese, he is to pay for every pig or goose a halfpenny; and if he have seven and under, he is to pay one, and to be allowed for them that want of ten a halfpenny apiece for every one, and so of an odd number of pigs or geese:" now with respect to this I do not know that there can be any reasonable objection to it; therefore there must be an issue directed concerning it if the rector chuse it.

A custom that geese should be delivered in kind before *Midsummer*, and that if any person have seven he should pay a halfpenny for each, and that if seven and under ten he should be allowed for

them that want of ten one halfpenny each, and so for an odd number, good.

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ROYSTON.

A custom
with respect
to wool, that
the parsonshould have the 10th stone or pound presently after clipping, and that any person selling sheep out of the parish after *Candlemas-day*, and before clipping, should nevertheless pay 1d. for the wool, good.

Then with respect to the custom for "wool, the tenth stone, or the tenth pound presently after the sheep be clipt; and if any person sell any sheep after *Candlemas-day*, before they be clipt, they do pay for their wool, for every sheep a penny if they do sell them out of the parish:" I do not know that there is any objection to that.

A custom that of rape seed the tenth bushel should be rendered ready dressed, the parson allowing for the dressing one penny per bushel; bad for uncertainty, it not being stated what was to be rendered for a less quantity than a bushel.

The next is "rape seed, the tenth bushel ready dressed, the parson allowing for the dressing one penny the bushel." The objection to that seems to be this;—that supposing there be no bushels, that is, a smaller quantity than a bushel or a bushel and a half, nothing is said as to what is to be paid then; I do not see how this can be considered as a valid modus, without stating it more distinctly than it is stated here. There must be an account taken of rape seed.

Query. Whether a custom to render the tenth tree is a payment in kind for wood.

"Wood, the tenth tree when it is felled." I used to think it would be in kind, but I understand the decisions of this Court have shaken that question. But there has been no wood cut by the occupiers, and therefore there is no occasion to decide this question.

Modus of 1d. at *Easter* for every acre of reed ground, good.

A custom to pay two eggs for every hen or duck, and for every cock or drake three eggs, in lieu of the tithe of eggs, bad.

There is another custom "item for every acre of reed ground that is *broken*, cropt, or mown in the year, one penny:" I see no objection to that. "Item at *Easter* tithe eggs, viz. for every hen or duck two eggs," supposing there are five hundred; "and for every cock or drake, either of them three eggs:" that cannot be good.

Then "the inhabitants are to pay to the parson yearly for every acre of *fed* ground in the said parish (*Throckenhold* not included.") Now in this case *Throckenhold* is

not distinguished at all ; therefore the objection applying to the three first moduses will apply here : this cannot stand. " For herbage one penny, or the fall " at the parson's election : what that is I do not know ; " for every dove-house sixpence ; for every house having an orchard or cherry-ground, so as it be above half an acre of land, one shilling. For every acre of new improved grounds in the marsh or fen which shall be mown twopence ; and for every such acre fed there one penny, or the fall at the election of the parson. That grounds sown with clover or such like seed, for the use and purpose of feeding horses, sheep, or beast, neat or profitable, shall be accounted as feeding land, and not otherwise ; and in case the parson shall take the fall, then in such year he is not to have the penny per acre herbage, neither in the old grounds, nor new improved grounds." We must always consider throughout this case what these grounds are ; they are grounds belonging to the *Bedford Level* : " tithe of cole-seed, mustard-seed, and turnip-seed, upon lands tilled, plowed, or sown, or ordered to that purpose, shall be paid in the same manner and proportion as rape-seed is said to be payable. That madder being a new improvement shall be paid in kind ; for every mill for the grinding of corn within the said parish, such modus or payment shall be paid therefore as is and has been heretofore paid for the same ;" that is nothing. " That due notice be given to the minister to take his tithe before any corn or grain be carried from off the premises ; that by the word fall shall be meant and intended the profits of wool, lambs, and calves, which the incumbent may take as above : " this is all interpretation, not a custom ; it seems to me to amount to nothing : then " every stranger occupying any feeding grounds or pasture, to pay the same acreage for the grounds or pasture for herbage after the custom of the field, as the inhabitants do pay for mown grounds or the fall at the parson's choice ; " that I do not understand. Under the circumstances of this case it seems

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to me that all the moduses except those I have specified must be considered as invalid.

The patron
and ordinary
necessary parties
to a bill
to establish a
modus.

The counsel for the defendants have placed great reliance upon the decree which is in truth their great muniment. Now if I am right in my opinion which I have given with respect to some of these payments, that they are not to be considered as moduses, I should consider it as a very great hardship on the parties if I were under the necessity of abiding by this decree; but if it had been a decree to establish these payments as moduses, I should have felt great difficulty in disengaging myself from it, however unjust I might consider it: but it certainly is not an establishing decree, if I may call it so; the proper parties are not there, and this furnishes a strong proof of the wisdom of the courts of equity, when they require the proper parties to be present, the ordinary and the patron. I will venture to say that if the ordinary and the patron had been parties to the cause referred to, and if they had done their duty, this decree never could have passed in the way in which it appears to have been made; in truth it is a decree to establish an agreement which is in a great measure a modern agreement; it mixes with the decree probably some ancient payments, but what those ancient payments are I do not know, I cannot distinguish them at all. The answer of the defendant, the rector, has been read, and I have read it over myself with great care; it exhibits a very true picture of the miseries of that time; the rector was completely in the power of the parishioners, and was forced to act up to their will and pleasure. The parsons of that day frequently entered into such agreements before they became rectors, in order to have some ease and quiet when they were placed in that situation; when, therefore, I see a decree that cannot be considered as a decree to establish for want of the necessary parties, and which, even looking at it in another point of view, as if the necessary parties were there, is not a decree to

establish, but a decree put upon the record by the agreement of the parties, and which explains the payments, stating that what is said as a fact is not to be considered as a fact, and is to be construed in another way, I feel myself called upon to say, that it is a decree which it is impossible for the Court to consider as binding, unless it be in point of law, such as cannot possibly be resisted. I think it clear that some of the payments in that decree would have been considered by the Court themselves as bad moduses, supposing the Court had paid the attention which would have been paid to it if the usual parties had been there to suggest the proper objections to the Court; others which might perhaps be considered as ancient payments, are not distinguished, and I do not know how I myself am to be guided by it, when I see that among the moduses themselves there acted upon, there are such as are not allowable by law. If I am right in that opinion, I am not forbidden by any thing in this decree to express that opinion, and to act upon it. I therefore think myself not only at liberty, but bound to make the decision which I have intimated already. In addition to all this, we must recollect, that at the time when these moduses must have had their origin, supposing them to be valid, the place was almost entirely under water, or at least in such a state that there could not have been any tithable matters on a very great part of it. How then can we look back into time immemorial, before the time of *Richard I.* to suppose these parties had entered into an agreement to make such compositions as are stated in the former decree. At that time there could have been no prospect of the improvements which have since taken place in that part of the country; they are entirely owing to exertions which have been recently made, and which no human foresight could have expected twenty years before they commenced. These agreements made in the *Bedford Level* are beginning but of late to operate; and therefore it appears to me we cannot be allowed to con-

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v
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sider the payments which this decree contemplates, in the absence of those who are the legal protectors of the church, as good as against the parson, who, at that time, as it appears by his own shewing, which is in evidence, was perfectly incompetent to act for himself.

Under these circumstances I think myself bound to direct an account of all the tithable matters the defendants have, except the specified moduses which I have mentioned.

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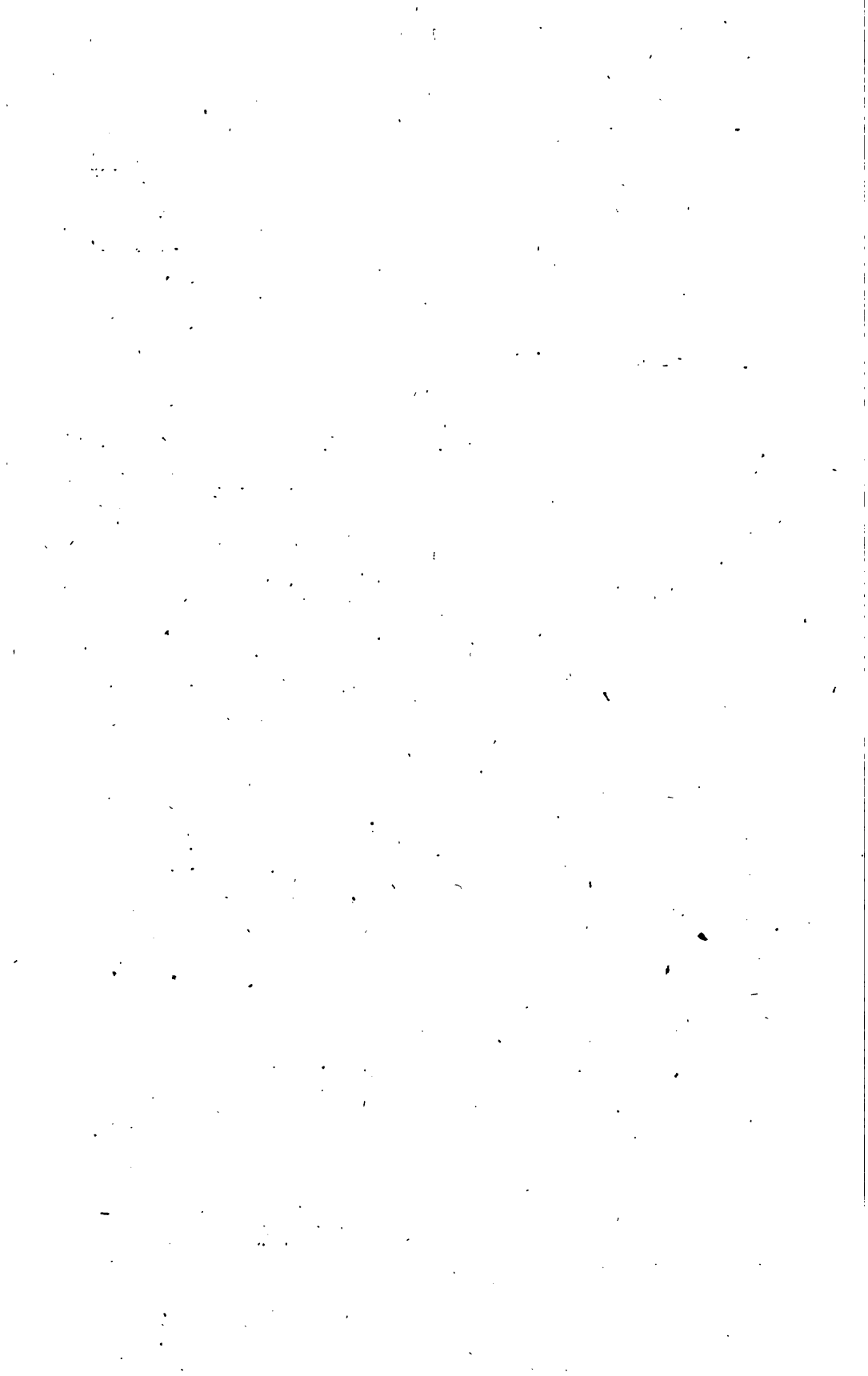
MEMORANDUM.

THOMPSON v. GORWAN.

April 9th.

IN this case Mr. *Dauncey* moved before the whole Court to vary the minutes of a Decree made by the Lord Chief Baron alone, upon which the Court said that all such motions must be made before the Lord Chief Baron on the days appointed for his sitting alone under the Act of Parliament.

END OF PART I.



R E P O R T S
 OF
CASES
 ARGUED & DETERMINED
 ON THE
EQUITY SIDE.
 OF THE
COURT OF EXCHEQUER.

Commencing in
E A S T E R T E R M,
 58 Geo. III. 1818.

—
WRIGHT v. SOUTHWOOD.

*Westminster
 Hall.
 April 13.*

THIS was a bill filed against the defendants as occupiers of certain lands in the parish of *Pitminster*, in the county of *Somerset*, for an account of the tithes of hay, and small tithes, had and taken by them from the lands in their respective occupations, within the parish.

A vicar, by shewing a general right to the perception of tithes in kind, places himself in the situation of a rec-

tor, and throws it upon the occupier to prove the existence of moduses set up and the lands to which they apply; and *semble*, that evidence of a general payment throughout the parish, of so much in the pound, in lieu of tithes regulated according to the poor's rate or rack rent, is sufficient evidence of a vicar's general right to tithes in kind.

1818.

WRIGHT
v.

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The plaintiff claimed under a lease from the vicar of the before mentioned parish, whereby the tithes or tenths of hay and all other vicarial tithes of *Pitminster*, with all manner of houses, buildings, barns, stables, gardens, orchards, rights, profits, and emoluments belonging to the vicarage, except Easter offerings, were demised unto him, his executors, administrators and assigns, for the term of fourteen years.

The defendants by their answer admitted the general right of the vicar to the tithes of the several articles mentioned in the bill, except as to those, in lieu of which, the moduses after mentioned, were stated to be payable; and alleged that all the lands in the parish, with the exception of certain farms therein described, were subject to moduses or customary payments to the vicar, in lieu of the tithes of hay, milk, calves, cyder, apples, pears, gardens, wool and lambs.

The only evidence produced, on the part of the plaintiff, in support of his claim to the tithes in kind, of these articles, were the depositions of the parish clerk, who stated, "that he had resided in the parish all his life, with the exception of four years, and, that during his knowledge of the parish, no tithes in kind had been rendered or paid for any titheable matters or things within the parish, except corn and wood; but that, during the whole of his remembrance of the parish, there had been paid or payable to the vicar, by the owners of estates when they occupied the same, 6*d.* in the pound upon the annual value, according as they were rated to the poor, and by the renters of estates, one shilling in the pound upon the annual rack-rent of the same, on Easter Monday in every year, in lieu of the tithes of all titheable matters, except corn and wood;" and upon this evidence a question arose, whether the plaintiff, as lessee of the vicar, had made such a *prima facie* case, as the defendants were called upon to answer.

Mr. *Dauncey* and Mr. *Dowdeswell*, for the plaintiff, contended that the evidence was sufficient to establish the vicar's general right to tithes in kind throughout the parish, and that it was for the defendants to make out in what manner their lands were exempted.

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Mr. *Horne*, Mr. *Shadwell*, and Mr. *Wray*, for the defendants.—A vicar has no common law right to tithes; he must make out his case by producing evidence either of an endowment, or of perception. Here the only evidence produced is, of payments of 6*d.* in the pound, according to the poor's-rate, by owners occupying their own estates, and 1*s.* in the pound, on the rack-rent, by renters. It is impossible such payments as these can have been payable under any endowment; and, indeed, they are not brought forward as such, but merely as evidence of a payment in lieu of tithes in kind. It is not even specified for what species of tithes they are payable. It is merely said that they are payable to the vicar in lieu of all tithes, and the vicar is clearly not entitled to all tithes. This never can be evidence in a parish, where there is a rector as well as a vicar.

LORD CHIEF BARON.

The question at present before the court is quite preliminary; viz. Whether I can, consistently with law, proceed farther with this case.

A rector is at law entitled to all tithes in kind; and if a defendant set up a modus, he must shew that the lands occupied by him are covered by that modus. In this respect there is no difference between a court of equity and a court of law, and it would be the same in prohibition. A vicar, however, must make out his case in the same manner as the lessor of the plaintiff in an action of ejectment. The difficulty in the present case is this, whether

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v.
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a defendant, admitting the vicar's right to all tithes, except those of a certain district, can call upon the vicar to make out his title to the tithes of that particular district; and it certainly appears to me, that if a vicar can in any way shew, that he is entitled generally to tithes, he puts himself in the situation of a rector, and that it is for the defendant, who must be best acquainted with his own case, to make out his exemption in the best manner he is able.

In this case there is no proof of any endowment; but there is evidence of perception of tithes in kind by the vicar, or of something in lieu of them; and it appears to me that this evidence is very strong to shew, that the vicar is entitled to tithe, generally. The witness states that he has known the parish for a great many years; and, though he does not say the vicar is entitled to tithes in kind, which, indeed, would be matter of law, and not of fact; he says, that ever since he has known the parish, the vicar has received a composition, payable in lieu of all tithes, except corn and wood.

This man speaks, not to the law, but to the fact. The payments he mentions must vary constantly, according to the poor's rate and rack-rent, which must alter many times in the course of a few years. This can be no evidence of a *modus*, but is evidence of a general payment in lieu of tithes in kind; and it, therefore, appears to me that in this case the plaintiff, as lessee of the vicar, has made out a clear *prima facie* title to all the tithes in this parish, except those of corn and wood: and that it is, therefore, thrown upon the defendants to prove the existence of the *moduses* they have set up, and to what lands they apply.

1818.

HALES v. POMFRET.

POMFRET v. HALES.

April 27.

THE bill in the first cause was filed by a lessee of the inappropriate rector for the tithe of hay; and, at the hearing of the cause, Mr. *Martin*, for the defendants, offered to read in evidence an original bill, filed in a former suit by the then rector, which had been afterwards amended and newly engrossed, in order to shew what the rector conceived his rights to be when he first submitted them to the court; but

Where a bill has been amended, the amended bill is the only one upon record. The original bill, therefore, cannot be read as evidence to prove what a plaintiff considered his right to be at the time of filing it.

Mr. *Dauncey* and Mr. *Owen*, for the plaintiffs, objected to its being read, upon the ground that the original bill having been amended, the amended bill was the only one upon the record.

LORD CHIEF BARON.

The original bill is certainly not upon record, and cannot be read. A plaintiff may insert many things in a bill, which he may strike out the next day by amendment. It is a frequent practice to state matters in a bill, in order to found interrogatories, to obtain from the defendant's answer a knowledge of the real state of the case, and when that is obtained, to amend the bill according to the facts appearing upon the answer. The plaintiff cannot be bound by his first statement. I cannot look into any bill but that which is upon record; and that which is upon the record before me is the amended bill.

Mr. *Martin*. I tendered the original bill as explanatory of the answer to it.

1818.



HALES.
v.
POMFRET.

LORD CHIEF BARON.

You certainly have a right to say this: I tender this answer, as an answer to something not now upon the record; but which must have been upon the record, as otherwise the answer would have been impertinent.

A bill to establish a modus should be filed by certain owners and occupiers of land within the parish, on behalf of themselves, of all other owners, occupiers, &c. And the ordinary should always be a party

In this case there was also a cross bill filed by the defendants, for the purpose of establishing the moduses set up by their answers in the original suit. The bill was stated to be at the suit of the defendants in the original cause describing themselves "*as owners and occupiers of lands in the parish,*" and the ordinary was not made a party.

The LORD CHIEF BARON

At the hearing dismissed the cross bill upon the merits; but observed that, if the merits had been good, the bill was incorrectly framed, as it was alleged to be exhibited by some of the owners and occupiers, and not by *all* the owners and occupiers of lands within the parish. That properly, a bill to establish a modus should be brought by owners and occupiers, on behalf of themselves and of all other owners and occupiers of lands within the parish; and that the ordinary should always be a party, he being the person to protect the rights of the church; and that he had never known an instance of a bill to establish a modus to which the ordinary was not a party, being brought to a hearing without its being ordered to stand over for the purpose of making him a party by amendment.

1818.

ROBERTS v. ROBERTS.

April 29.
May 17.

THE bill was filed by the devisees of one *George Roberts*, for the purpose of setting aside a voluntary demise of certain hereditaments, for a term of years, executed by the testator in his lifetime to the defendant as a qualification to kill game.

A person executing a deed for the purpose of defrauding the law, cannot come into equity for the purpose of setting it aside, even though the instrument has never been made use of; and, therefore, if *A.* convey an estate to *B.* as a qualification to kill game, equity will not compel a re-conveyance.

The bill stated, that in the month of *August*, 1815, the testator being possessed of the property in question, which was held by him under a freehold lease for lives, was applied to by the defendant, who was his brother by the half blood, and who represented to him, that it would be very advantageous to him, the defendant, if the testator would execute a conveyance to him of his interest in the property mentioned in the bill; and requested him so to do, under the assurance that the conveyance, when made, should be merely nominal, and that, as to the beneficial interest in the property, he, the defendant, would be a mere trustee for the testator.

That the testator agreed to comply with such request; but upon a most clear and unequivocal understanding that the conveyance was to be nominal, and that the testator was in fact to receive all the rents and profits arising from the property, and was to have the full and absolute ownership and benefit of it; and that such being the agreement and understanding between them, the testator and the defendant both went to the office of *Mr. Thomas Price*, a solicitor at *Worcester*, and gave him instructions to prepare such a deed or instrument as he should think proper for carrying their intentions into effect.

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ROBERTS
v.
ROBERTS.

That Mr. *Price* accordingly prepared a deed, which was executed by the testator and the defendant, on the third day of October, 1817. Whereby, in consideration of the natural love and affection which he bore to the defendant, his brother in law, the testator demised the property in question to the defendant, his executors, administrators, and assigns, for the term of 99 years, if the persons, for whose lives the testator held the estate, should so long live.

That, on the execution of the deed, the testator delivered it to the defendant, in whose possession it had ever since been : but that the testator retained all the title deeds and other writings, relating to the property, in his own possession ; and that neither the defendant, nor any other person, had ever made any use of the deed ; nor was the defendant ever in the occupation or enjoyment of the property, nor did he in any way derive any advantage from the conveyance, the testator having continued in the possession of the premises up to the time of his decease.

The bill then stated the death of the testator, in *March*, 1816 ; having previously to the execution of the deed in question made a will dated *June* 18, 1811, under which the plaintiffs claimed ; and that since the testator's death the defendant had commenced an action of ejectment, for the purpose of obtaining possession of the premises under the indenture of demise executed to him by the testator ; and therefore prayed that he might be compelled by the decree of the court to deliver up the indenture to be cancelled, and to re-convey the premises to the use of the plaintiffs, and for an injunction to restrain the defendant from proceeding in the ejectment.

The defendant, by his answer, denied that he had made the proposal mentioned in the bill ; but stated that being for many years past much addicted to field sports,

and not being qualified by estate to kill game, he had been threatened with prosecutions; and that he, therefore, applied to the testator, who was his brother of the half blood, to qualify him, which the testator agreed to do, and had, for that purpose, executed the deed mentioned in the bill. The defendant, however, denied that the deed was executed for the sole purpose of affording him a qualification to kill game; but alleged that the testator in executing the same had it also in view to secure the property to the defendant after his decease. He admitted that no use had ever been made of the deed, and that the property had always continued in the possession of the testator.

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ROBERTS
v.
ROBERTS.

It appeared by the evidence of Mr. Price who prepared the deed, and of other persons who were present at its execution, that it was prepared by the directions of the testator and the defendant, for the express purpose of qualifying the defendant to kill game; and that, immediately after the execution of it, the testator and the defendant were asked, "whether they knew the nature of it, as it was a dangerous instrument to trust in the hands of any one." Upon which the defendant answered, that "he knew it was only executed to lend him a qualification to kill game," and the testator said, "he knew he could trust the defendant with the deed," whereupon the defendant replied "he hoped so, and that the testator might have the deed again when done with." Several other circumstances were also detailed by the witnesses examined on the part of the plaintiffs, from which it clearly appeared that the intention of the testator, in executing the deed, was merely to give the defendant a qualification.

No evidence was read on the part of the defendant.

An injunction was obtained by the plaintiffs for want of an answer; which, upon the answers coming in, was

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ROBERTS

v.

ROBERTS.

continued to the hearing, for which purpose the cause now came on.

Mr. *Dauncey* and Mr. *Joseph Martin* for the plaintiffs, contended, that the object of this deed being to defraud the law, the whole transaction was void; *ab initio*; that although it might in general be true, that a person making a conveyance with a fraudulent view cannot apply to the court to set it aside; yet that, where the purpose is not completed, the party has a *locus penitentiae*, in which he may come to a court of equity for relief. That this principle was laid down by Sir *Thomas Plumer*, V. C. in *Platmone v. Staple (a)*; and that, therefore, in the present case, no use having been made of the deed, the plaintiffs were entitled to have it set aside.

Mr. *Martin* and Mr. *Simpkinson*, for the defendant. There are in this case many more points than have been stated on the part of the plaintiffs. It has been assumed that the deed was never made use of; and that, therefore, the case is the same as if the defendant had intended to be a candidate for a seat in parliament, but had not become so: but it never can be contended that the mere act of shooting was requisite to constitute its being put in use.

In what right do the plaintiffs make this claim? For any thing that appears they are mere volunteers, and not in any way connected in blood with the testator:—and are persons so situated to be allowed to raise this question? Unless they can make out that the defendant is a trustee for them, they cannot succeed. It is not pretended that any fraud was practised by the defendant upon the testator. The deed was prepared by his order, and executed by him, with a perfect knowledge of its effect. The moment the deed was executed, it operated as

(a) Cooper 253.

a revocation of the testator's will, for the term of years which it created ;—what, therefore, is there to sustain the argument of a trust for the plaintiffs?

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ROBERTS
v.
ROBERTS.

At all events, the defendants cannot be in a better situation than the testator was in. Now, what was the situation of the testator? Being informed by his brother that informations had been brought against him for shooting game, to prevent farther inconvenience to him, the testator directs this deed to be prepared, in order to defeat an act of parliament. What equity can a party making a conveyance, for the purpose of defeating the law, have to be relieved from the effect of his deed. The court could not, under such circumstances, have raised any trust on his behalf; and if no trust could have been raised for him, it cannot be raised for the present plaintiffs, who are mere volunteers. The operation of the deed was to revoke the will, *pro tanto*; therefore, as devisees under that will, they can have no interest to enable them to call for a re-conveyance.

But, admitting that they are in such a situation under the will, as authorizes them to apply to the court to set aside the deed, can they be permitted to say that this deed was executed to defraud the law; and therefore, call upon the court to interfere, the testator under whom they claim having been a party to the fraud? The law says, that where a man does an act to defraud the intention of the legislature, he shall suffer all the inconveniences of his act, *Curtis v. Perry (a)*; here, the testator does all he can to commit a fraud upon the legislature, or, at least, to enable another person to commit one; and there is no distinction between a man's committing a fraud himself, and his doing what would enable another to commit one. *Nightingale v. De-visme (b)* is (as

(a) 6 Vez. Jun. 747.

(b) 5 Burr. 2589.

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far as it goes) in our favour on this point. It shews that the court of King's Bench recognized no such distinction. By what right, therefore, can the plaintiffs, standing, as they do, in the place of the testator, claim to be exempted from the inconvenience occasioned by the testator's fraudulent act?

Mr. *Dauncey* in reply.—There is no doubt as to the justice of this case. It is quite clear that the testator never meant to part with his property, for any purpose than the one now stated. It is certainly true that these parties were about to do that which the law did not permit; but that object never was obtained. It appears that the defendant never had any occasion to make use of the instrument. It was intended he should have this deed to produce in case any information was laid against him; but he never did produce it. What rule of equity, therefore, is there, which says, that if an instrument is made for a fraudulent purpose, but which purpose is never carried into effect, the party shall not have it in his power to revoke it?

The testator having made this deed for the purpose of enabling the defendant to do an illegal act, might, before that act was committed, have called for a reconveyance in order to prevent its taking place. This doctrine is confirmed by the case cited by the Lord Chancellor in *Curtis v. Perry* (a), which has been cited. If, therefore, this was an illegal act, it was void, and would not operate as a revocation of the will; and the plaintiffs, as devisees under the will, are entitled to the property.

[LORD CHIEF BARON.

If the deed be void, the plaintiffs want no reconvey-

(a) *Ante*.

ance. They might defend themselves in ejectment; and, if so, I can render them no assistance. So that they are in this situation. The deed, if void, is no revocation of the will, and they might defend the ejectment; and, if it be not void, it is a revocation; and the present plaintiffs are not entitled.]

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Mr. Dauncey.—The bill states the deed to be in the hands of the defendant, so that, assuming it to be void, there is a ground for a court of equity to interfere, by requiring it to be delivered up.

LORD CHIEF BARON.

I do not think that I can interfere in this case, without first referring it to a court of law. My opinion at present certainly is, that it is not void at law; but that is subject to further consideration. I shall be sorry not to reach the defendant, because it is impossible to say he has acted with any view to honour or honesty. With respect to the case before the Vice-Chancellor, I am afraid his authority in granting an injunction is not greater than that of this court when they granted the injunction in the present case. I cannot see the distinction there made as to the deed being used or not.

LORD CHIEF BARON.

*Gray's Inn
Hall.
May 17.*

This is a bill filed for the purpose of compelling a conveyance of an estate, executed by *George Roberts* the testator, to the defendant, who was his half brother. It appears that the conveyance was made for the purpose of giving the defendant a qualification to kill game; and I feel myself at a considerable loss to know in what manner I am to grant relief.

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I do not think the plaintiffs are entitled to a re-conveyance. The deed was executed maturely. The grantor knew the effect of it. There was no fraud at the time between the brothers: with respect to them the whole transaction was perfectly fair. But it appears by the evidence that the object of the deed was to give the defendant the appearance of a qualification, and that it was executed for no other purpose; that was a fraud on the law, and I cannot perceive what right that gives the plaintiffs to come into a court of equity to call for a re-conveyance. It is said that nothing was done under the deed; but I cannot see the distinction. Sir Thomas Plumer is reported to have acted upon such a distinction: but that was a mere interlocutory order. There is a great difference between an interlocutory order and a decree. All the facts of a case may not be before the court when an interlocutory order is pronounced. I cannot, therefore, act on the authority of that judgment. It appears to me that it is not in the power of a court of equity to call back a deed so given (a).

(a) It is a maxim of law which prevails also in Courts of equity, that in *pari delicto potior est conditio defendentis*; and upon this principle it has been decided that wherever a man does an act, the purpose of which is to defeat the policy of the law, he is precluded from afterwards taking advantage of the illegality of that act to defeat the effect of it; therefore, where *A.* and *B.* being partners, purchased ships with their joint property; and, because *B.* was in parliament, the ships were regis-

tered in the name of *A.* only, in order that profit might be made by the employment of them in contracts with government; the court held that the ships were the separate property of *A.* *Curtis v. Perry*, 6 Vez. 747. The same principle appears from a manuscript note of the case by Lord Kenyon to have been acknowledged by the court of King's Bench, in *Nightingale v. Devisme*, reported in 5 Barr. 2589; although they were of opinion that the form of action there adopted was not the

It has been urged, however, that the deed is void at law ; and I will not shut out that question. If it be void, the plaintiffs have a complete defence at law ; and I have no objection to retain the bill for a year, for the purpose of giving them an opportunity of trying the question (a).

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ROBERTS
v.
ROBERTS

proper remedy. And in *Montefiori v. Montefiori*, 1 Black. 363. Lord Mansfield laid it down as a rule, that a man should not be allowed to set up his own iniquity as a defence, any more than as a cause of action ; and so in the case mentioned by Lord Eldon in giving judgment in *Curtis v. Perry*, ante, of a bill filed to have a re-conveyance of a qualification, given by the plaintiff to his son to enable him to sit in parliament, the bill was dismissed by Lord Kenyon, with costs. In *Platmone v. Staple*, supra, the Vice-Chancellor appears to have considered that the circumstance of the purpose for which the deed was made, not having been accomplished, made a material distinction between the cases then under decision and that mentioned in *Curtis v. Perry*, which, the manner in which that case is mentioned in the report, to have been stated by Lord Eldon, appears, in some measure, to warrant ; but it seems, from the case in the text, that no such distinction exists.

(a) Since this case was determined in the court of Exchequer, the opinion of the Lord Chief Baron has received the sanction of the court of King's Bench, upon a motion for a new trial of the action of ejectment abovementioned to have been brought by the defendant in equity against the plaintiff, for the purpose of recovering the possession of the property demised by deed in question. The action was tried before Mr. Baron Garrow, at the last Midsummer Assizes, for the county of Worcester, when the plaintiff at law obtained a verdict, the learned judge who tried the cause laying it down that the deed was of no validity in consequence of the circumstances of fraud attending its execution : but a motion was made for a new trial in Michaelmas term following, and the rule was made absolute in Hilary term last. The court of King's Bench being of opinion that though the deed was fraudulent, yet that it did not lie in the plaintiff's mouth to say so,

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v.
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The plaintiffs claim to be entitled under a will made long before this conveyance; but where a person, after making a will, executes a deed with full knowledge of what he is doing, if the deed be good, I cannot say it is not a revocation of the will; and then, if it be a revocation, it is a revocation *pro tanto* and the devisees take only the reversion, as nothing but the reversion passed by the will. If so, the plaintiffs are not entitled to call for a re-conveyance, and the bill cannot be sustained by them. If I dismiss the bill, it will be without costs (a).

as he was a party to the fraud himself; and they relied on the language of Lord Mansfield in

Montefiori v. Montefiori, supra, as decisive of the question (1).

(a) *Decree, May 17, 1818.*

It is ordered, adjudged, and decreed by the court, that the plaintiffs' bill be, and the same is hereby retained in this court until next *Michaelmas* term; and that the injunction formerly granted by this court, until the hearing of this cause or further order to restrain the said defendant, *Thomas Roberts*, from proceeding against the said plaintiff, *Ann Roberts*, in the action of ejectment, in the pleadings of this cause, mentioned and brought by the said defendant against the said plaintiff, *Ann Roberts*, to obtain possession of the

premises in question in this cause, be dissolved so far as the same restrains the said defendant from proceeding to trial in the said action of ejectment; but the said defendant is not to take out any writ of possession in such ejectment. And it is further ordered and decreed by the court that the said defendant, *Thomas Roberts*, do proceed to trial in the said action of ejectment, at the next *Summer assizes*, to be holden in and for the county of *Worcester*: and that the said plaintiff, *Ann Roberts*, do plead to issue, and defend the said action. And the consideration

(1) The reporter is indebted for the above note of the case in the King's Bench, to the kindness of one of the present reporters in that court.

of costs, and all further directions herein, are hereby reserved until such trial shall be had. And this cause is to be continued in the paper of causes to be further heard.

upon the return of the *postea*, upon the trial of the said action, when such further order will be made herein as shall be just.

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ROBERTS
v.
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Between JOHN GOODWIN, EDWARD WELLINGS, the Younger, and ARTHUR DAVIES,

PLAINTIFFS,

AND

JOHN LIGHTBODY, the Younger,

DEFENDANT,

By Original Bill;

And between EDWARD WELLINGS the Elder, JOHN GUEST and RICHARD WILLIAMS, (Assignees of the Estate and Effects of the said JOHN GOODWIN,) the said EDWARD WELLINGS, the Younger, and ARTHUR DAVIES, PLAINTIFFS,

AND

The said JOHN LIGHTBODY, - - DEFENDANT,

*Westminster
Hall, May 27.*

By Supplemental Bill.

THE original bill in this cause was filed for the purpose of enforcing the specific performance of an agreement entered into by the defendant, for the purchase of certain hereditaments, situated in the parish of *A trader makes a conveyance of all his real and personal property to trustees to sell for the benefit of his creditors, under which the trustees contract to sell certain lands to defendant. The contract not being completed, they file a bill against defendant for a specific performance; but, before answer, the trader becomes bankrupt, and his assignees file a supplemental bill to enforce the contract: Held, that although the conveyance to the trustees was an act of bankruptcy, the assignees may compel the performance of the contract made under it.*

M

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GOODWIN

v.

LIGHTBODY.

Llanllwchairn, in the county of *Montgomery*, under the following circumstances :—

In the month of *August*, 1812, the plaintiff *Goodwin*, by indentures of lease and release, conveyed certain real estates in question to the plaintiffs, *Wellings* and *Davies*, and their heirs, upon trust, to sell and apply the proceeds in payment of his debts. The release also contained an assignment of all *Goodwin's* personal property, upon the same trusts.

On the 17th of *September*, 1812, the plaintiffs, *Wellings* and *Davies*, in execution of the trust of these deeds, entered into an agreement with the defendant for the sale to him of the real estates comprised in them, for the sum of 17,500*l.*, which was to be paid by instalments.

The first instalment of the purchase-money was paid by the defendant at the appointed time ; but it was afterwards discovered that the plaintiff, *Goodwin*, had, previously to the execution of the indentures of *Sept.* 1812, entered into a contract with *John Hartley*, for the sale of two pieces of meadow land, containing above four acres, part of the property contracted to be sold to the defendant, the possession of which, it was alleged, was material to the full enjoyment of the defendant's purchase ; in consequence of which discovery, the defendant refused to complete his contract ; and, thereupon, the plaintiffs, *Wellings* and *Davies*, in conjunction with *Goodwin*, instituted the present suit against the defendant, for the purpose of enforcing a specific performance of the agreement. The plaintiffs offered, by their bill, to indemnify the defendant against *Hartley's* claim, and to permit an adequate part of the purchase-money to be paid into court, there to remain until it should have been investigated.

After the commencement of the suit, a commission of bankruptcy was issued against *Goodwin*, under which he was declared a bankrupt; and his assignees filed a bill, in the nature of a supplemental bill, against the defendant, for the purpose of obtaining the benefit of the proceedings in the original suit.

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GOODWIN
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The defendant, by his answers to the original and supplemental bills, admitted the contract, and submitted to perform it, provided a good title could be made by the plaintiffs: but insisted that the execution, by *Goodwin*, of the deeds, under the authority of which the sale was made, was an act of bankruptcy, and that the contract was, therefore, void. He also alleged, that the possession of the two pieces of meadow land agreed to be sold to *Hartley* was absolutely necessary to the full enjoyment of the rest of the property comprised in the contract, because they were close to the mansion house and that they were made an absolute condition in the purchase, at the time the contract was entered into; and the defendant insisted that he was not bound to accept a title to the residue of the property, and to receive a compensation in lieu thereof, inasmuch as no compensation in money would be satisfactory to him; and that he never would have entered into the agreement unless the two pieces of meadow land had been comprised in it.

Mr. *Martin* and Mr. *Girdlestone*, for the plaintiffs, contended, that with respect to one of the objections made by the answer, namely, that the two pieces of land claimed by *Hartley* formed a *sine quâ non* in the contract, the case was not yet ripe for the discussion of that point. That the contract having been admitted, the court could do no more at present than refer it to the deputy remembrancer, to enquire whether the plaintiffs could make a title or not; and with respect to the objection arising from the deed itself being an act of bankruptcy,

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they insisted it was waived by the assignees having agreed to the contract. That it was not necessary that a plaintiff should have a complete title to property which he has sold at the time of filing his bill; and that the court would decree a specific performance, if it were satisfied that the contract might be completed before the deputy remembrancer has made his report.

Mr. *Dauncey* and Mr. *Wray*, for the defendant, relied upon the objections stated in the answer. They also contended that *Hartley* ought to have been a party to the suit.

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It does not seem to me, that the defendant wishes to avoid completing the contract; on the contrary, he submits to the performance of it, provided a good title can be made. The circumstance of the assignees having agreed to become co-plaintiffs, gives to the defendant all their interest in the property. Suppose I were to sell an estate, and before the conveyance should be complete were to become a bankrupt, my assignees might choose whether they would perform the contract or not. With respect to the objection as to the two pieces of meadow land, that must be matter of subsequent consideration. If it should appear that they are material, and that the plaintiffs cannot make a title to them, the contract cannot be performed. It is impossible for me to insist upon *Hartley's* being made a party. Let it be referred to the deputy remembrancer, to enquire whether the plaintiffs can make a good title to the estates agreed to be sold.

The defendant's counsel submitted that it ought to form part of the decree, that the deputy remembrancer should make a separate report as to the two pieces of land claimed by *Hartley*. But

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Said, he never recollected an instance of such a direction; and, therefore, should not give it: but that if the defendant should afterwards find it necessary, he might then make an application for a separate report.

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Decree for plaintiffs.

RIDLEY v. STOREY.

Westminster
Hall, Nov. 18.
May 25, 26.

THIS was a bill filed by Sir *Matthew White Ridley* and Dr. *Henry Ridley*, as the devisees of Sir *M. W. Ridley*, deceased, for an account of all tithes, except corn and grain, had and taken by the defendants from lands in their occupation, within the manor of *Cramlington*, in the county of *Northumberland*.

A composition real, or grant of tithes, made by a vicar to the lord of a manor, in consideration of his finding a priest to officiate in a chapel, &c. previously to the 32 Hen. VIII. c. 7. and supported by evidence of constant perception and compliance with the conditions on which it was made: held to be valid.

The case made by the plaintiff's bill was, that the vicarage of *St. Nicholas, Newcastle*, in the county of *Northumberland*, of which the manor, township, and chapelry of *Cramlington*, in the same county, was part, was, in the year 1194, endowed with all the tithes arising within the said vicarage, or the titheable places thereof, and continued so endowed from that time until the year 1536; when, in consequence of the inconvenience arising from the manor, township, and chapelry being at a considerable distance from the residence of the vicar, *John Heringe*, the then vicar thereof, made and executed a composition real, or grant, with or to a person of the name of *Thomas a Cramlington*, then lord of the manor of *Cramlington*, which was duly confirmed, "whereby, in consideration of the lord of the manor taking upon him-

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self, at his own costs and charges, to find and present a priest qualified for the performance of all the duties of the chapelry of *Cramlington* aforesaid, and also paying to the vicar yearly two capons and one cheese, or the value thereof, the said *John Heringe*, as such vicar as aforesaid, granted and agreed for himself and his successors that the said lord of the said manor of *Cramlington* should have, receive, take, and enjoy all tithes whatsoever, except corn and grain, arising, growing, and renewing, within the said manor, or the titheable places thereof."

That from the time of such composition real, the proprietors or owners of the manor of *Cramlington* had been in the receipt of all the tithes, except those of corn and grain, yearly arising within the manor, township, and chapelry of *Cramlington*, and the titheable places thereof, and had presented a curate or chaplain to the said chapelry, and had paid the sum of 5*l.* annually to such curate or chaplain, and had in like manner delivered, or caused to be delivered, the two capons and a cheese to the vicar for the time being of the said vicarage, or made him a pecuniary or other satisfaction for the same.

That, after various mesne conveyances and descents, the manor of *Cramlington* had become vested in the testator, Sir *Matthew White Ridley*, by virtue of which he, the testator, became entitled under the before-mentioned composition real or grant, to receive and retain all the tithes, except those of corn and grain, of all the lands within the manor, chapelry, or township, and the titheable places thereof, (except the tithes of certain lands, in the possession of *Adam Mansfeldt Lawson de Cardonnell*, which had been granted by *John Lawson*, under whom the testator derived title to *Hylton Lawson*, under whom the said *A. M. L. de Car-*

donnell claimed and enjoyed the same,) and also to the perpetual advowson of the said chapelry, and had, accordingly, from time to time, received such tithes, and had presented the plaintiff, Dr. *Henry Ridley*, to the curacy thereof, and paid him annually as such curate of the said chapel the sum of 5*l.* and delivered the two capons and a cheese to the vicar, according to the terms of the composition real, or grant, or made him satisfaction for the same.

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That Sir *Matthew White Ridley* died in the year 1813, having previously made a will, under which the plaintiffs became owners of the manor of *Cramlington*, and as such claimed to be entitled under the composition real, or grant, to all the tithes but those of corn and grain, arising on the lands within the said manor, township, and chapelry, except the lands in the occupation of *A. M. L. de Cardonnell*; and that the defendants were the occupiers of such lands, and had subtracted the tithes, &c.

The evidence produced on the part of the plaintiffs, in support of the case made by the bill, commenced with a confirmation in 1360, by *Thomas Hatfield*, Bishop of *Durham*, of an endowment made by *Hugh Pudsey*, Bishop of *Durham*, in 1294, by which the vicarage of *St. Nicholas, Newcastle*, was endowed with the tithes of hay, and all other tithes, except the tithes of corn and grain. Parol evidence was then read, to prove that the chapelry of *Cramlington* was generally reputed to be comprized within the vicarage of *St. Nicholas, Newcastle*.

An old paper writing, purporting to be a copy of the original composition real, or grant, mentioned in the bill, was then produced, and proved to have come out of the proper custody, which paper writing was in the following words:—

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" *The Conteintes of the Composition reall*" " *That the*
 " *aforesaid Thomas Cramlington his Hares for euer*
 " *shall att theyer owen Deuise Electyon and wyll & att*
 " *theyer owen Coistis and charges fynde & pnte one*
 " *abell psie to syng or saye & imprester all deuoe sarvice*
 " *sacraments & sacrametalls att Cramlynton within the*
 " *Chapell the'r wiche preste shall discharge the Viccare*
 " *aforesayd & is successores of all maner of charges*
 " *spiretuall & temporall any maner of wise deu or her-*
 " *after to be dewe unto ower Sowerayng Lord the King*
 " *the Bysshop of Durham the Archden of Northumber-*
 " *land or any hauing or pretendynge any maner of*
 " *Jurisdecton spētual or temporall and for that shall re-*
 " *seue att maner of tēyndes & oblacons w^a the appurtences*
 " *except the tēynde corne paying yarely and contētynge*
 " *ower & aboive the fyndyng & Salarye of the aforesayd*
 " *preste at the feste of the translation of Sainte Nicholas*
 " *& wyth the church of Sainte Nicholas att Newchastell*
 " *medyallyt after hye mase that daye Recognytion that yt*
 " *is the Mother Church of Cramlynton to the same Mas-*
 " *ter John Herynge now Viccare and his Successors for*
 " *the time beyng for ewermor or unto ther Deputis there*
 " *in that behalf of the frowtis of the same Manore off*
 " *Cramlynton w^a the appurtences two Cappons prise v^a a*
 " *pece and one Chese prise xi^s in the name and for full cō-*
 " *tētacion of all maner of tyndes oblaciones dewe or to the*
 " *Viccare for the tyme being owett off the Manor and*
 " *Hamlett of Cramlynton aforesayd w^a owett any maner*
 " *of payment or demand any wyse so that the brynger off*
 " *the said two cappons and a chese shal use these wordes or*
 " *lych effect to the Viccare or his Depates ther that is*
 " *to saye 'I have browghte unto yowe Master Viccare*
 " *such tyndes as we be bowinde bye Composycon to bryng*
 " *& her I doo knowleg for the Maner off the Hares*
 " *off Cramlynton, thatt Hamlett, of Cramlynton is*

“ pcell & payerte off the parish of Sainte Nicolas of
 “ Newcastle & a Chappell depending thereof and forther it
 “ is provydt and agreed that if the sayed Thomas Law-
 “ son his Heyres doe brecke & natt trewlye and
 “ dewlye wythoute frayed or Coveyne obey and kepe the
 “ Intent is of this Composicon that the sayed Viccaré
 “ for the tyme beyng to be at large to clayme tucke
 “ and gather his tynds and tythes suche as the lawe
 “ wyll geive hym wth owte any y^lterruption of the
 “ said Thomas or is heyres & noye time shall
 “ before anie such Brecke
 “ shall induce any prescription or custome And In
 “ witness of this ppetuall and fynall end and composi-
 “ cian, &c.”

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In confirmation of this paper, there was then produced, on the part of the plaintiffs, an inquisition *post mortem* of one *John Lawson*, (from whose descendants the ancestor of Sir *Matthew White Ridley* was proved to have purchased the manor of *Cramlington*,) bearing date the 17th Jac. I. in which the Jury find "that the said *John Lawson* died seized of a moiety of the manor of *Cramlington*, and the tithes of all the manor, except corn and grain, by virtue of a composition real, made from *Herynge*, vicar of *Newcastle*, 27 Hen. VIII. duly confirmed, as by the said composition and confirmation to the Jury shewn, appears." There was also produced an extract from the register of the Bishop of *Durham*, dated in 1541, by which it appeared that a vicar, of the name of *Herynge*, resigned the vicarage of *St. Nicholas, Newcastle*, about that time.

The next evidence shewed, that the terms of the composition had been followed by the payment of the two capons and a cheese to the vicar of St. *Nicholas* yearly,

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as far back as the middle of the 17th century, by means of entries in the vicar's books of receipts for the *Cramlington* tithes; and it was proved that the ancestor of Sir *Matthew White Ridley* had purchased the *Cramlington* estate, and the tithes in question, of one *Lawson*, a descendant of the *Lawson* mentioned in the inquisition *post mortem*, subject to this payment to the vicar.

It was then proved, that in modern times a pecuniary composition had been paid to the vicar, in lieu of the capons and cheese; and that Sir *M. W. Ridley* and his ancestors had always found and presented a curate to the chapelry, and had enjoyed the chapel garth, and repaired the chancel.

The plaintiff's counsel then produced in evidence many old leases by the *Lawsons*, under whom the plaintiffs derived title, of as early a date as the reign of *Charles II.* and also a grant from a former owner of the manor of the small tithes of the only other estate within the manor, except those of plaintiff and defendant, to the ancestor of *A. M. L. de Cardonnell*, the present owner of that estate. They then proved the conveyance from the *Lawsons* to Sir *Matthew White*, the ancestor of the testator Sir *M. W. Ridley*, and by steward's books and receipts, proved the actual perception of the hay and small tithes of every part of the defendant's estate, down to the time of the subtraction mentioned in the bill. The occupation of the lands and the subtraction of tithes by the defendants was admitted by the answer.

The only evidence produced on the part of the defendant to rebut the case made by the plaintiff, consisted of a conveyance to an ancestor of the defendant *Storey*, in the year 1736, of the manor of *Cramlington*, and other manors, in which conveyance were contained general

words comprising tithes: but no evidence was adduced of any perception of such tithes, on the part of the defendant.

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Upon this evidence the principal questions which arose were—1. Whether the composition real, or grant of the tithes by the vicar to the owner of the manor, had any legal effect; and—2. Whether the plaintiffs had made out a sufficient case to entitle them to the benefit of it.

Mr. *Fonblanque* and Mr. *Farrer*, for plaintiffs.—This composition real, or grant, was a conveyance by the vicar, rector, patron, and ordinary, of the tithes and ecclesiastical profits enjoyed by the vicar of St. *Nicholas, Newcastle*, in that part of his parish which lay within the manor of *Cramlington*, to be taken and enjoyed by *Thomas a Cramlington* and his heirs, for the consideration mentioned in the copy of that instrument, which has been given in evidence. Previously to the disabling statutes of 1 *Eliz.* and 13 *Eliz.* a parson, vicar, or other ecclesiastical incumbent, "*concurrentibus iis qui jure requiruntur*," could convey or charge the hereditaments he held in right of his church. (a) The word "*tithes*" in sect. 3. of 13 *Eliz.* shews, that in passing the act the mischief of ecclesiastical persons granting their tithes for estates in fee, or for life, was in contemplation. This power of alienating tithes, and other ecclesiastical property, was the origin of those special cases in which tithes might be vested in laymen, as in the cases of *Pigot v. Hern*, (b) *Boocker v. Rogers*, (b) and *Phillips v. Prytherick*. (c) A layman, it is true, was said not to be capable of tithes: but this supposed incapacity arose not from the nature of the property, but because there was no court in which he could sue for them as tithes. He was, however, permitted to sue

(a) Co. Litt. 44. a. Lit. *Winchester's case*, 2 Rep. 45. sect. 528. 648.

1 Roll. Rep. 2.

(b) Cited in the Bishop of (c) 4 Gwill.

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for them as a temporal profit *apprendre* by the description of the tenth shock (*decima garba*) instead of *decimas garbarum*; and Lord Coke says, he might sue in the Ecclesiastical Court. When the grant to *Thomas Lawson* was made in 27 Hen. VIII., he could not then, it must be admitted, sue for the tithes *eo nomine*; but he might have sued for them in the common law courts, as the tenth cock of hay, the tenth lamb, &c. The tithes vested in him, and did not merge in the land, or become extinct. The transaction was, in fact, a grant, giving a right to the enjoyment in pernaney, and did not operate as a discharge of the land from tithes. The grantee held the land and the tithes distinct, for tithes are collateral to the land, and to be taken upon it, but not issuing out of the land; and they are not extinguished by unity of possession, nor by a release of all right to the land, *Lincoln v. Cooper*, (a) *Hinde v. Perkins*, (b) and *Wickham v. Cooper*. (c)

The following propositions are deducible from the cases which have been cited:—1. That in a special case, even before the statute of Hen. VIII. (d) a layman was capable of tithes at common law. 2. That he might sue for them even in the Ecclesiastical Court. 3. That to support his title, the court would presume that the owner of the manor was originally seized of all the lands constituting the manor. 4. That the tithes were severable from the manor or land of which the tithes were granted, as in *Phillips v. Prytherick*. (e) 5. That by such composition or other lawful means, the lord or owner did not merely discharge his lands from the payment of tithes, but the tithes continued collateral to, and distinct from, the land, and were grantable, or capable of being reserved by the lord or owner, after he had alienated the

(a) 1 Leon. 248.

210.

(b) 1 Gwill. 161.

(d) 23 Hen. VIII. c. 7.

(c) 1 Gwill. 165. Cro. Eliz.

(e) *Ante*.

manor or land. 6. That tenancies, or parcels of the manor or lands, might afterwards be granted out; and that those tenancies were grantable, with a reservation of the tithes by the lord or owner of the land.

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Although the original grantee in this case could not sue for the tithes at the date of the grant; yet the power of suing for tithes in the spiritual court was given him by 32 Hen. VIII. c. 7. five years subsequent to the grant, the tithes having been once granted, and being a possession distinct from the land, and not being a parcel of or issuing out of a manor (although they might be appurtenant to the manor,) became alienable as any other incorporeal hereditaments.

Mr. Agar and Mr. Meggison for the defendants.— In a suit preferred by a layman, for payment of tithes, long possession by himself, and those under whom he claims, is not sufficient, of itself, to constitute the necessary evidence of title; but a lawful commencement of that possession must be shown. The counsel for the plaintiffs, aware of this rule, have produced, as the origin of their title, the grant of 1536/. This grant, however, must have been invalid. At common law, before the stat. 32 Hen. VIII. c. 7. a layman was incapable of receipt, or, as it is expressed, pernaney of tithes; except in the cases of the King, his patentee, and the tenant of an ecclesiastic; (a) and this grant was made four years before this statute; the grantee appears to have been a layman; and it is, in its terms, a grant of tithes in pernaney. But supposing such a grant might have been made, it could only have been made by a rector; no instance has ever occur-

(a) The Bishop of Winchester, 633. *The Aldermen of Chester's case*, Gwill. 167. and *Burgesses of Bury St. 2 Rep. 48. Pigot v. Heron, Edmunds v. Evans*, Gwill. ante, *Trollope v. James*, Pol. 762.

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red of a vicar being allowed to alienate the tithes of which he has been endowed, and besides, there is no evidence to prove that the grant in the present case was made with the consent of the necessary parties. The only evidence of the grant which has been produced, is a copy of the instrument, and that is attempted to be confirmed by an inquisition *post mortem*; but that is very questionable evidence, such inquisitions having been in general taken *ex parte*. No evidence has been produced of the persons, under whom the plaintiff claims, having a derivative title from the grantee, or of their having fulfilled the conditions of the grant, by providing a priest: the inquisition merely shews that *Thomas Lawson* was entitled; but there is nothing to prove any transmission of interest from *Thomas a Cramlington*, to whom the grant was made, to *Thomas Lawson*. The defendants, on the other hand, have shewn a conveyance of the manor and tithes to *Storey*.

Mr. *Fonblanque* in reply.—Every presumption will be made in support of a grant under which there has been such long and continued enjoyment. Supposing the grant to have been legal, it is quite clear, from the cases already cited, that the tithes might be held distinct from the manor; and, therefore, the conveyance of the manor to *Storey* proves nothing, unless coupled with a perception of the tithes.

Nov. 18.

LORD CHIEF BARON.

This is a bill filed by Sir *Matthew White Ridley* and Dr. *Ridley*, for an account of all tithes, except those of corn and grain, taken by the defendants from lands within the manor of *Cramlington*, in the county of *York*, which is within a part of the parish of *St. Nicholas*, in *Newcastle*. Mr. *Storey*, one of the defendants, sets up a claim to the manor and to the tithes in question; but he

offers no evidence in support of his claim, but a conveyance, made in the year 1736, in which the manor of *Cramlington* and other manors are conveyed with general words, comprising tithes at large; but this proves very little indeed, without any evidence of perception under the conveyance.

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The principal question in the cause is rather a singular one; at least to me it is so, as I do not recollect any other under exactly the same circumstances. It depends, however, on a very simple point. The plaintiffs claim as purchasers from the vicar of *Newcastle*. That the vicar of *Newcastle* was originally endowed with the tithes in question seems, I think, sufficiently clear from the evidence. He continued to be so entitled until the year 1535, at which time a transaction appears to have taken place between him and another person, which is called by the heading of the paper adduced in evidence a composition real. This transaction was an agreement between the vicar and a person named *Thomas a Cramlington*, by which in consideration of *Thomas a Cramlington* providing a priest to do all the service belonging to the chapel of *Cramlington*, and paying two capons and a cheese annually to the vicar, the vicar gives to *Thomas a Cramlington* all the tithes which were due to the vicar; that is to say, all the tithes, excepting corn and grain. This contract, I think, has been sufficiently proved.

Another paper is then produced, which is a copy of an inquisition *post mortem* of *Thomas Lawson*, who succeeded *Thomas a Cramlington* in his possessions at *Cramlington*, by which it appears, that this composition real, as it has been termed, was considered as in force at that time, namely, in the 17 Jac. I. This instrument clearly acknowledges the existence of the composition real, or, as it has been more properly described, grant; and we

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must, therefore, consider it as proved, that it existed in the 17 *Jac.* I.; and that the party who claimed under it, took the tithes at the time it was returned.

Now, with respect to the law, as it applies to this subject, there is no doubt that, at common law, a layman was not capable of the pernaney of tithes, except in special cases, which special cases it is not necessary to mention now: but I take it to be equally clear that a layman was capable of taking a discharge of tithes by means of a composition made by the rector or vicar, with the consent of the patron and ordinary, so that although he could not claim tithes in pernaney, he might claim to hold his land discharged from them. Many cases were cited in argument, in support of this proposition; and it is not necessary now to refer to them. This was the law before the 32 *Hen.* VIII.; so that although *Thomas a Cramington* could not, under this contract, take the tithes in pernaney; yet the instrument, beyond all doubt, had a legal operation to discharge his land from the payment of them, but it gave him no power to recover them. The statute of 32 *Hen.* VIII. was then passed, which gave to a layman that which the common law refused him, namely, a right to sue for and recover his tithes. One of the great difficulties which occurred to laymen having tithes, arose from the circumstance of their having no remedy for them. The common law did not give any action for tithes; and the ecclesiastical courts never suffered a layman to sue for them, except in the cases which have been mentioned. The act of parliament, however, of 32 *Hen.* VIII. gave a layman a title to tithes in pernaney, by enabling him to maintain a suit for them in the ecclesiastical courts.

Let us now see what have been the transactions in the present case, from that time to the present. The plaintiffs in this suit, and those under whom they claim, have,

beyond all doubt, been in the actual perception from the defendants themselves, and those under whom they claim, of all the tithes demanded by this bill. There has been no interruption in the enjoyment, nor any dispute on the subject, until the refusal by the defendants to account, which has occasioned the present suit. So that, as far as living memory can go, and as far, indeed, as written evidence can well shew, from all time, in fact, that evidence can reach, the plaintiffs, and those under whom they claim, have been in the clear and undisputed perception of the tithes.

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But it has been urged, that although this contract appears to have been made between the vicar and *Thomas a Cramlington*, in 1535; yet it does not appear that the ordinary and patron ever gave it their consent; which is certainly true; but, after all this usage and constant perception, I cannot suffer the present defendants, who have always paid the tithes themselves, to say, that every thing was not done in this case which was requisite; nor do I apprehend it to be necessary, in all cases, when a composition real is set up, to prove the consent of the patron and ordinary. It may be inferred from other facts and circumstances. (a) Although there has been of late a very respectable opinion against it, I perfectly agree in the doctrine, which I conceive to be clearly established, that there must be some written evidence of a composition real. (b) That evidence I have here in the written instrument which has been put in; which is sufficient to shew that a composition real was entered into. In addition to that, I have evidence of perception from the time of Hen. VIII. to the present moment. This compels me to believe and presume that all the necessary consents

(a) See *Sawbridge v. Burton*, 4 Gwill. 1397. 2 Anst. 372. S. C. (b) *Vide Bennet v. Skeffington*, ante, p. 10. and the cases cited in note (b) page 12.

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were given. But even if it had been necessary, which I do not conceive it to have been, to presume that this composition real was made subsequently to 32 Hen. VIII. I should have felt myself bound, in this case, where all the perception has been adverse to the defendants, and in favour of the plaintiffs, to presume that this composition real had been re-executed and re-assented to after that time. It is clear that it was done before the restraining statute of Queen Elizabeth.

Under all these circumstances, although the case is not one of ordinary occurrence, the principle of law as applied to it seems to be perfectly clear; and I am of opinion that the plaintiff is entitled to a decree for an account.

I do not think that costs ought to be given, because it is, as agreed on all sides, a perfectly singular case: I shall, therefore, give no costs up to this time, and shall reserve the consideration of the costs of all subsequent proceedings.

Decree for plaintiffs without costs.

WILLIAMSON v. LORD LONSDALE and Others. *November 23.*

THIS case was again set down for argument upon the following points :—

1. In addition to the townships of *Winton*, *Hartley*, and *Naithby*, mentioned in the former report, (a) there were two other townships within the parish of *Kirkby Stephen*, namely, *Soulby* and *Smardale*, the tithes of which were claimed by the bill.

The defendants, who were occupiers of lands within these townships, insisted that the tithes of hay and agistment belonged to the impropriate rectors or their lessees; and, in support of their case, their counsel produced a grant made by *Edward VI.* dated the 5th of June in the 3rd year of his reign, whereby, amongst other things, he granted "To Sir *Richard Musgrave*, of *Hartley*, Knight (under whom the present impropriators derived their title) all that his rectory and church of *Kirkby Stephen*, in the said county of *Westmoreland*, then late parcel of the possessions of the monastery of *St. Mary's*; and also the advowson of the vicarage of *Kirkby Stephen*, and all glebe land and tithe of corn and hay, and all other tithes, oblations, and obventions, whatsoever, to hold the same unto the said Sir *Richard Musgrave* and his heirs, to the use of him, the said *Richard Musgrave*, and of his heirs and assigns for ever."

Where a vicar succeeds in establishing a general right to all tithes, except those of corn and grain, throughout a parish, it requires very strong evidence to shew that an impropriator of a particular district, who claims under a grant, limiting his title to the excepted articles, is entitled to the tithes of any other thing.

An impropriator is not a necessary party to a bill by a vicar against occupiers; and if made one, he may demur. Bill dismissed against him, but under circumstances, without costs.

They also produced two leases dated in the year 1751, made by Sir *George Dalston*, the then impropriate rector, to certain proprietors of land within the townships of

(a) *Ante*, page 49.

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Soulby, and of *Waithby*, another township within the parish, of all the tithes of corn, grain, and sheaves, and of *Hay and Grass* growing within these townships; and proved by the depositions of various witnesses the payment to Sir *George Dalston*, and those who claimed under him, of the rent reserved in such leases.

They also proved by the evidence of a witness who had resided many years within the parish, that, during all the time he had any knowledge of the parish, a modus or composition in lieu of the tithes of grass whether mown, or made into hay, or eaten by barren cattle, upon all lands within the township of *Smardale*, had been paid to or for the use of the owner of the *Smardale Hall* estate (who derived title under Sir *George Dalston*) as the owner of all the tithes of corn, hay, and grass, arising from lands within the township; and that such modus or composition amounted to 1*l.* 1*s.* 3*d.*, and was collected annually from all the occupiers of land within that township.

They also read depositions of witnesses to prove that no tithes of grass, or agistment, or composition in lieu thereof, had, within the time of living memory, been paid to the vicar in respect of any of the lands within the townships in question.

2. A question also arose as to the costs of the lay impropriators of these townships who had been made defendants to the suit.

LORD CHIEF BARON.

The impression upon my mind at the hearing was that there was sufficient evidence to shew that the vicar was entitled to all the tithes throughout the parish, except those of corn and grain. No endowment was certainly

produced; but the vicar put in the ecclesiastical survey and minister's account, which specified a great number of tithes as payable to him, which, I thought, was sufficient documentary evidence to shew that he was generally endowed with all tithes, and that the grant to the impropiator was confined to corn and grain.

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It is clear, therefore, that the vicar is entitled to the tithe of agistment throughout the rest of the parish. The defendants ought, consequently, if they could, to have shewn some opposite title with respect to these townships.

If I see that a vicar is generally entitled, and that an impropiator claims under a grant which limits his title to a particular thing, I must have evidence to shew that the vicar has lost the right which he certainly had at one time, and that the impropiator has acquired it, before I can decide in his favour.

I admit, that if there had been evidence of perception on the part of the impropiator, it would have altered the case; but the evidence of perception here is too slight to deserve attention.

I am, therefore, of opinion that the plaintiff is entitled to an account of the tithes of agistment within these townships.

As to costs.—I can make no decree against the impropiators; and I certainly shall not give them costs. They should have demurred. If a bill is filed against *A. B.* as occupier, and *C. D.* as owner, *C. D.* may demur; and the same principle applies to this case.

I am aware that this question has caused great doubt to many. Lord Chief Baron *Eyre* compared it to the case of an heir at law; but, with great deference to that

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learned judge, I think this is a mere possessory bill. I remember his frequently calling upon counsel to make the impropiator a party, even at the hearing; and I feel the weight of his authority very much; but my own opinion is, that the impropiator is an unnecessary party; I shall, however, under the circumstances of this case, dismiss the bill against the impropiators without costs.

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Jan. 13, 1819.

Ex parte RICHARD MATTHEW and Others,
IN THE MATTER OF *CHERTSEY MARKET*.

The Court has jurisdiction over all charities under 52 Geo. III. c. 101. for the purpose of administering the funds, even though created by royal charter. *Secus* where the purpose is to regulate the charity only, in which case the crown only can interfere by virtue of its visitatorial power.

THIS was a petition presented under the *stat. 52 Geo. III. c. 101.* by certain persons describing themselves as inhabitants and housekeepers of and in the town and village of *Chertsey*, in the county of *Surrey*, stating,

That Queen *Elizabeth*, by her letters patent bearing date the 8th day of February in the 46th year of her reign, granted and gave power to certain persons therein named, their heirs and assigns, for the relief of the poor that did or should thereafter inhabit within her said vil-

A petition for the restoration of a market-house, &c. which had been erected on land granted by royal charter, for the purpose of holding markets and fairs thereon, the tolls of which were to be applied to charitable purposes, (but which had been pulled down, and rebuilt on another piece of land,) on the ground that the removal had been prejudicial to the market tolls, &c. dismissed with costs; it appearing that the market-house had been pulled down and rebuilt with the consent of the lessee of the manor, under the crown, and of the inhabitants of the town, who had defrayed the expences by voluntary subscription; and that the tolls of the market had not been injured, &c.

The petition was presented against the representatives of one of several trustees, alleging, that he was the sole *acting* trustee; held that the other trustees, or their representatives, ought to have been before the Court, they having assented to the acts complained of.

lage of *Chertsey*, to hold and keep within her said village of *Chertsey* a market on *Wednesday* in every week in the year, and one fair or mart over and besides the fairs and marts before that time held and kept within the said village; which fair or mart should begin on *Monday* in the first week of clear *Lent*, and should continue for all that *Monday* and *Tuesday* then next following, together with a court of *pie poudre* there in time of the said markets, fairs, or marts, and every of them, to be held, and together with poles, piccage, stallage, and all customs, profits, commodities, and emoluments whatsoever, to such markets, fairs, or marts, and courts of *pie poudre*, and every of them, belonging or appertaining, or from such markets, fairs, or marts, and court of *pie poudre*, coming, happening, arising or growing. Yet so that the aforesaid markets, fairs, or marts, should not be to the hurt of other neighbouring markets, fairs, or marts, lying near. And that in the time of the markets, fairs or marts aforesaid, or any of them, the aforesaid persons, their heirs and assigns, might by themselves, or their sufficient deputy or deputies, have, receive, and collect for the relief of the poor, that should inhabit within the aforesaid village of *Chertsey* customs and tolls of all and all manner of merchandize, wares, chattels, and things, thereafter sold or bought within the aforesaid markets, fairs, or marts, or any of them, without interruption or hindrance of her Majesty, her heirs and successors, or any of her or their officers or ministers; and her Majesty did thereby for herself, her heirs and successors, firmly charge, ordain, and command, that the aforesaid persons, their heirs and assigns, should thereafter and for ever hold and enjoy within the said village of *Chertsey*, for the relief of the poor that were, or should be, the inhabitants of the said village, a market on every *Wednesday*, in every week, and the aforesaid fair or mart yearly and every year beginning on the first *Monday* in the first week in clear *Lent*, and to last all that *Monday* and *Tuesday* then

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next following, together with the aforesaid court of *pie poudre*, and all and singular the tolls, customs, rents, jurisdictions, usages, profits, and emoluments, whatsoever, to such markets, fairs, or marts, which should thereafter come and arise. And for the better keeping, celebrating, and enjoying the markets, fairs, or marts, as therein mentioned, Her Majesty thereby gave and granted to the aforesaid persons, their heirs and assigns, for ever, a certain piece and parcel of vacant plot and waste ground therein described. To the intent that the said grantees, their heirs and assigns, might have power to found, erect, build, and make, thereupon a market-house, giving and granting to the aforesaid persons, their heirs and assigns, licence to found, erect, and build, as well the aforesaid house, upon the aforesaid piece of ground, as also so many and so big stalls and standings from time to time, in and upon the aforesaid piece, or in and upon any other places within the manor of *Chertsey*, and as big as should seem necessary and convenient to them, their heirs and assigns, for the better commodity and profit of the inhabitants of her said village of *Chertsey*, and of all that should buy and sell within the markets, fairs, or marts aforesaid, for the buying, selling, and exposing to sale such wares, victuals, merchandizes, and other things which should be saleable from time to time in the markets, fairs, or marts, to hold and enjoy the aforesaid markets, fairs, or marts, together with the court of *pie poudre*, and the aforesaid piece of ground, and the aforesaid market-house, and all houses, buildings, and stalls or standings, thereupon to be built and erected, and all the profits from thence thereafter to come and arise to the aforesaid persons, their heirs and assigns, to the use and relief of the poor that were or should be inhabitants of the said village upon certain services therein mentioned,

That, shortly after the grant of such charter, a sub-

stantial, convenient, and extensive market-house, with a court-house, and large lofts or granary over the same, containing two stories high, were built on the piece or plot of ground, thereby granted. And numerous persons from the surrounding country, from that time until the same was pulled down, as therein-after-mentioned, were accustomed to bring the produce of their lands and commodities unto such market-house for sale; and that a large and greatly increasing trade or business was formerly, and till within the last twenty years, carried on there on the usual market days and fairs throughout the year; and that large tolls were, on such days, received by the trustees for the time being, for the benefit of the poor of the town or village of *Chertsey*.

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That a person of the name of *Brown*, who was formerly one of the feoffees or trustees, was, from the time of his being appointed such trustee, the acting trustee or manager of the trust estate.

That in or about the autumn of the year, 1809, *Brown*, without the concurrence of any of his then co-trustees, and against the express objection of some of them, and under the indemnity of some persons who were not feoffees, and who were interested in having the markets, fairs, and market-house and court-house destroyed, caused the market-house and court-house to be pulled down and destroyed, and sold part of the materials of the buildings, and applied the proceeds arising from the sale, together with the remainder of the materials of the buildings, to his own use and benefit, without accounting for the same, or any part thereof, to his co-trustees, or to any other person or persons interested therein, and without in any way applying the same or any part thereof in improving the estate of the said charity, or in benefitting the poor of the town or village of *Chertsey*.

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That the market-house was, at the time *Brown* caused it to be pulled down, in some small degree out of repair in consequence of *Brown's* having let it to a felmonger, and having neglected to keep it in a due state of repair in order that he might have some pretence for pulling it down; but that at the time it was pulled down it was a very strong, sound, and substantial building, and might have been thoroughly repaired at a very moderate expence.

That in or about the year 1809, many of the inhabitants of the town or village of *Chertsey*, and some of the trustees complained to *Brown* of the destruction of so fine a building, and of the great injury he had done to the town and village of *Chertsey*; and also to the charity estate, by pulling down the market and court-house in direct opposition to the charter; and that *Brown*, being alarmed at the threats and remonstrances of such inhabitants, proposed to build a new market-house, and set on foot a subscription in the town or village of *Chertsey* for building the same, and collected a very considerable sum of money for that purpose; and did, in or about the year 1809, build, with part of the money so subscribed, a small open building, which he called a market-house; but that such new building was, in every respect, very inferior to the building which he, *Brown*, had pulled down; and that there was no loft or granary over it, as there was over the old market-house, in consequence whereof a much less quantity of grain and other commodities was brought to market; and that the new building was much smaller than the old market-house in every respect, and built in an inferior manner, and of worse materials, by reasons of which divers dealers were under the necessity of exposing their goods and merchandizes in the open street, whereby many persons declined attending the ancient market of *Chertsey*; and that there was no

court-house to the new building by reason whereof the ancient court of *pie poudre* could not be held in the town on the market days and fair days, as formerly, to the great injury of the inhabitants, and to all those who attended the markets and fairs, who were formerly accustomed to have justice administered to them by the steward, for the time being, of the court, in the least expensive and quickest manner; and that formerly a bench of justices was held, once a fortnight, in the old court-house, which formed part of the market-house which had been pulled down, at which time all the inhabitants had free access to such justices; but that now such justices sat in a private room of the *Swan* inn, with closed doors, to the great prejudice of the inhabitants of the town or village of *Chertsey*.

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That *Brown* had caused the new building, such as it was, to be wholly built on ground belonging to Messrs. *Porters*, brewers, in the town or village of *Chertsey*, instead of building the same on the site of the old market-house, or on the ground granted by Queen *Elizabeth* for that express purpose. And that it was believed he was induced to commit such breach of trust in expectation of some business, fee, or reward, to be given to him by Messrs. *Porters* in order to increase the trade of an inn or public-house, called the *Crown* inn, belonging to them, which adjoined such new building, and from which *Brown* or Messrs. *Porters* had opened a door or communication into the new building or market-house.

The petition then charged that *Brown*, during the period he was trustee, received divers large sums of money from the tolls and dues paid by the persons who attended the markets and fairs in the town or village of *Chertsey*; and had applied but a very small portion, if any, of the monies which he so received, towards maintaining or relieving the poor of the town or village

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of *Chertsey* ; but had disposed of the remainder of such monies to his own use and benefit, without in any way accounting for the same, or any part thereof.

That *Brown* departed this life on or about the 21st of September, 1812, having first duly made and published his last will and testament, and thereby appointed certain persons therein named the executors thereof, who, after the death of *Brown*, renounced the probate of his said will ; whereupon letters of administration of the personal estate and effects of *Brown*, with his will annexed, were granted by the proper ecclesiastical court to *Ann Walker* and *Sarah Brown*, two of his next of kin.

The petition then stated various feoffments, and other conveyances and assurances, whereby the trust property had become vested in the present feoffees or trustees, whom it charged with having, from time to time, received divers sums of money on account of the tolls, dues, and profits, arising from the trust estate and premises, without applying the same for the benefit of the poor of the town.

It then alleged that, although the population and trade of the town or village and neighbourhood of *Chertsey* had increased fourfold since the reign of Queen *Elizabeth* ; yet, through the neglect and misconduct of *Brown*, the markets and fairs of the said town or village had almost entirely dwindled away, and were very inferior to the markets and fairs of adjoining towns.

That the market of *Chertsey*, instead of being a pitched morning market, as theretofore, where abundance of grain, provision and commodities of various sorts were sold, was, in consequence of such misconduct of *Brown*, now dwindled into an afternoon sample market, at which a great part of the grain and pulse consumed

by the inhabitants of the town or village of *Chertsey*, and its vicinity, was bought and sold by a few millers and monopolizers, whilst drinking in a close room of the inn, to the great injury and prejudice of the inhabitants, for whose benefit, advantage, and convenience, the charter had been granted, and to the great loss of the charity funds.

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That many ancient inhabitants of the town or village of *Chertsey* could well remember, as the facts were, that there were, about eighteen years ago, fourteen or fifteen butchers' shambles in the market, where butchers brought their meat from all the surrounding country; and that many persons of many other trades were went to attend the market, whereas, at that time, not a single country butcher attended the market, for want of the necessary accommodation of a sufficiently large market-house or shambles; and that from the want of such convenience, and also from the want of a court of *pie poudre*, where redress was formerly had for petty frauds and impositions, the neighbouring farmers, dealers, and trades-people, were deterred from attending the market; and that although the present trustees insisted upon receiving toll of poulterers who attended the market, yet they were obliged to sell their commodities and to transact their business in the open street.

The prayer of the petition was, that it might be referred to the deputy-remembrancer to enquire and state what was the value of the materials of the old market-house and court-house pulled down by *Brown*; and what he did with the same, and how much money he received from the sale of such parts of it as he had sold; and, if he converted any part to his own use, what was the value thereof. And that he might also enquire and state what were the dimensions, state, and condition, of the old market-house and court-house at the time the

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same was so pulled down ; and what sum of money would then have been sufficient to repair the same ; and what sum of money would be required for rebuilding the same upon its former plan, site, and dimensions. And that the personal representatives of *Brown* might be directed to pay into Court on account of the charity estate, the value of the materials of the old market-house and court-house and such other sum and sums of money as the deputy-remembrancer should report to be necessary for rebuilding and reinstating the market-house and court-house, on the same plan and site, state and condition, as they were in when the same were pulled down as aforesaid. The petition also prayed that an account might be taken of the tolls, dues, and other profits, or sums of money, possessed or received by *Brown* in his lifetime for and on account of the said trust estate ; and also of his payments ; and that the personal representatives of *Brown* might be ordered to pay what, upon taking such accounts, should appear to be due from the estate of *Brown* to the trust estate into the hands of the deputy-remembrancer. It also prayed an account of the money and property possessed and received by the present trustees since their appointment ; and that they might be ordered to pay the amount to the deputy-remembrancer to the credit of the said trust estate.

It then prayed that the sums so to be paid into the hands of the deputy-remembrancer might be applied in rebuilding the said market-house upon its former site, plans, and dimensions : and otherwise, for the benefit of the said charity, as the court should direct ; and that the deputy-remembrancer might be directed to enquire into the trusts of the charity, and to approve of a proper scheme for rebuilding the said market-house and court-house, and for restoring the court of *pie poudre*, and for building shambles and sheds in the said market, and for re-establishing a morning market in the said

town and village of *Chertsey*; and also for applying the rents and profits, which should thenceforth arise from the said trust estates, according to the original trusts thereof.

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Several affidavits were filed verifying the allegations in the petition. Affidavits were also filed on the part of *Brown's* executors, from which it appeared that for more than fifteen years previous to the year 1809 the market-house and market-place, which consisted of a vacant space of ground surrounded or inclosed by wooden pillars which supported a building consisting of one room of the same dimensions as the vacant space beneath, was let to one *Wright*, a felmonger, at the annual rent of 7*l.* 12*s.* being the best rent which could be procured for it, and its full value; and that the fair, and markets, and all the tolls, pickage, stallage, customs, profits, commodities, and emoluments, belonging thereto, were let to *Wright* for the annual sum of 5*l.* making together the annual rent of 12*l.* 12*s.*

That adjoining the market-house, and forming the side of it next the church, was erected a cage or prison for the confinement of disorderly and such other persons as were ordered to be therein confined by the magistrates of the district.

That, within the recollection of some of the oldest inhabitants of the town of *Chertsey*, the room or building over the market-house had never been used for a court-house, nor did the magistrates of the district ever assemble there for the purpose of transacting any public business, nor was any court of *pie poudre* ever held therein, nor was it ever used or required for the purpose of the markets or fairs, nor was any pitched market ever held in the market-place beneath the room or building.

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That *Brown* was not the acting manager of the said trust-estate, till a short time previous to the year 1809; when, in consequence of the death of several of the other trustees, he became the acting manager thereof.

That a few years previous to the year 1809, the parish church of *Chertsey* having become ruinous, and fallen into decay, an act of parliament was obtained for taking down the body and rebuilding it, which was accordingly done at an expence of above 12,000*l.* and completed in the year 1809. That at that time the market-place and room over it which adjoined the church yard, being very close to the body of the church, obstructed the view and darkened some of the windows of it, and also projected to a considerable distance into the public street and highway, and was greatly out of repair; and that the cage or prison adjoining had become ruinous and insecure; in consequence of which, and of the market-place (which was very seldom used for the vending of commodities) having also become the evening rendezvous of a number of idle and dissolute men and boys, and women of loose character who were used to issue therefrom, and insult the passers by, and being otherwise the scene of brawls and riots on a Sunday to the disturbance of the persons assembled in church for the purpose of Divine worship; it was proposed by the principal inhabitants of the parish and town of *Chertsey* to *Brown* and the other trustees, that the market-house and cage or prison should be taken down and removed from its then site; and that another market-house, of nearly similar dimensions, but without a room over it, should be built in a more convenient situation in the town, and in a line with the other houses in the street; and that such market-house should be inclosed with an iron railing to prevent disorderly persons from assembling therein; and that for that purpose, and in order that the trustees and feoffees of the fair and markets might not sustain any injury in

their trust-estate by agreeing to such proposition, it was further proposed that the materials of the market-house should be sold, and that after such sale should be made what further sum should be required for the erection of the new market-house should be defrayed by the voluntary subscription of the inhabitants; and, as it appeared that the trustees would sustain an annual loss of 7*l.* 12*s.* by the taking down the room or building over the old market-house, it was also proposed, that the sum of 152*l.* should be raised by a further voluntary subscription, which being placed out at legal interest would raise the aforesaid annual rent or sum of 7*l.* 12*s.*

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That *Brown*, and all the other trustees in 1809, except one of the name of *Goring* (who made no objection) by writing under their hands, consented to such arrangement and proposal; and that, in consequence of such consent, the old market-place and building over it, and the cage or prison were taken down by the said inhabitants, and a new market-house and cage or prison were built on a vacant spot of ground adjoining the Crown Inn, and facing the main street or highway, being at the distance of about fifty yards from the scite of the old market-house, and in a central situation, and more convenient in every respect than was the situation of the old market-house.

That the materials of the old market-house, cage, or prison, were sold for the sum of 125*l.* and that the erection of the new market-house, cage, or prison, cost the sum of 409*l.* 7*s.* 6*d.*; and that the sum of 284*l.* 7*s.* 6*d.*, the difference between the value of the materials of the old market-house, and the costs of the new market-house, was, together with the sum of 152*l.* (the interest of which was to raise the annual rent or sum of 7*l.* 12*s.*) raised by voluntary subscription in the parish, to which the Duke of York, as lessee of the Crown, the members for the county, and many other persons, contributed.

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That the parish of *Chertsey*, in public vestry assembled, contributed, out of the poor rates of the said parish, the sum of 75*l.* towards the erection of such market-house, cage, or prison; and no person appealed against the allowance of the overseers' accounts, on account of their having contributed and paid out of the poor rates such sum of 75*l.*, or made any objection thereto.

The affidavits generally denied that *Brown* pulled down, destroyed, or sold, any part of the materials of the buildings of the market-house; or that he applied the proceeds arising from the sale thereof, or any of the materials of such buildings, to his own use, as alleged in the petition; or that he was actuated by any corrupt or interested motives in taking down the old market-house, or that he caused the new market-house to be erected adjoining to the *Crown Inn*, because such inn belonged to Messrs. *Porter*, brewers, in *Chertsey*, or in order to increase the trade of the inn, or in expectation of any fee, or reward; and it was sworn that the scite of the present market-house was selected by all the principal inhabitants of the said parish, who subscribed to the erection thereof, because it was the most commodious situation in the town for its erection.

On the hearing of this petition, the following points were discussed: 1st, Whether the Court had jurisdiction, this being a case of a charity founded by royal charter; 2nd, Whether upon the facts of the case a sufficient ground appeared to warrant the interference of the Court; and, 3rd, Whether the representatives of *Brown's* co-trustees ought not to have been made parties.

Mr. Dauncey, *Mr. Agar*, and *Mr. Duckworth*, for the petitioners.

1. This is an application under the statute 52 *Geo. III.*

tr. 101.: but whatever may be the effect of that act, it does not alter the jurisdiction which the Court had previously to its passing. There is no doubt that the Court always had jurisdiction in cases where the revenues were in the hands of trustees, which is the present case.

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2. In *Ex parte Greenhouse*, (a) the pulling down a chapel, and converting a burying ground to other uses, was, under circumstances very much resembling those in the present case; considered as a gross breach of trust. But, whatever power they had as to pulling down the market-house, it is quite clear that by the words of the charter the trustees had no power to re-build it on any other ground than that granted by the charter. Here it is sworn in no less than six affidavits that the market-house is built on lands belonging to persons of the name of *Porter*, who may, at any time, by bringing an ejectment, recover the possession of the land, and destroy the building. It is also clear from the affidavits that the place where the market-house was originally situated was the most convenient spot for the purpose in the town; but that it has been removed to a very inconvenient spot, and built on a much smaller scale. In addition to this, the court of *pie poudre* has been completely lost by the removal. No man can doubt the advantage of such a court. But it is alleged that a new church was built near the spot, and that the cage attached to the old market-house was unsightly to the new church. This, however, ought to have been taken into consideration by those who built the church. As to the old market-house having been a place of resort for improper persons, that objection might apply to any other building; even a church porch might be removed for the same reason.

3. With respect to the objection that the representa-

(a) 1 Mad. 92.

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tives of *Brown's* co-trustees are not before the Court. If there be any weight in it, the Court will give us permission to add them. This is not, however, a case arising from a breach of contract, but from a tort. Where there is a contract, you must bring all the necessary parties before the Court; but where there is a tort, it is sufficient to bring those only by whom it was actually committed.

Mr. Jervis and *Mr. Beames*, for the representatives of *Brown*.

1. Though the words of the statute do not narrow the jurisdiction of the Court had before it, it is quite clear that they do not enlarge it. It is laid down in a series of authorities that, in cases of charities founded by royal charter, courts of equity do not interfere except where the revenues are in the hands of trustees, *Eden v. Forster*, (a) *Attorney-General v. Foundling Hospital*, (b) *Attorney-General v. Smart*, (c) *Attorney-General v. Middleton*. (d) The reason is, because in all cases where the King is the founder, he is the visitor, as he is where he and an ordinary person join in a foundation. (e) This is not an application to regulate the funds of this charity, but merely to restore a building; and, even if it were, there are no funds in the hands of *Brown's* representatives for which they can be accountable. All his accounts have been long since settled, and the balance paid. At all events the operation of this statute is not retrospective. It did not pass till the year 1812, and the acts complained of arose in 1809.

2. This is an application to restore a nuisance which

(a) 2 P. Wms. 325.

(b) 2 Vez. Jun. 42.

(c) 1 Vez. 72.

(d) 2 Vez. 327.

(e) 2 Inst. 68.

was removed nine years ago with the assent of the Duke of York as lessee of the Crown. Indeed, if any breach of trust has been committed, all the persons of consequence, either in the town or county, were parties to it; since they not only acquiesced in it, but contributed towards the expence of it. That part of the prayer which seeks a restoration of the court of *pie poudre* is ridiculous. *Ex parte Greenhouse (f)* is quite a different case from this: that was an application to restore a chapel, and not a charity instituted by royal charter. In that case there had been no new chapel built: but here a new market-house has been erected; and, as we contend, in a much more convenient spot than the old one. Much stress has been laid upon the distance to which the market-house has been removed from the spot where it formerly stood; but this distance is not above forty or fifty yards. Most of the old market-houses in the kingdom have been pulled down, and many of them rebuilt on different scites; and if this application succeeds, they must all be pulled down again, and restored to their original places. It is impossible the market can have been injured by a removal of about forty or fifty yards only. It has been said that, in building the new church, allowance ought to have been made for the propinquity of the market-house; but a new church must necessarily be built upon the scite of the old one which has been consecrated. It was, therefore, easier to remove the market than the church; and this the trustees had a right to do, according to the decisions in *Curwen v. Salkeld, (g)* and *The King v. Cotterell. (h)* The circumstance of the market-house having been rebuilt upon land not comprised in the charter is of no consequence. Supposing the ground upon which it stands to be private property, no ejectment can be brought to recover it again

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of CHERTSEY
MARKET.*

(f) *Ante.*

(h) 1 Barn. and Alderson 67.

(g) 3 East. 538.

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from the trustees. If private property be once dedicated to the public, it can never be resumed. The case frequently occurs in the instance of roads, and the doctrine has been recognized in a variety of decisions. *Rugby Charity v. Merryweather*, (i) *King v. Lloyd*, (k) *Woodyear v. Haddon*. (l)

3. Supposing a breach of trust to have been committed, the co-trustees of *Brown* were parties to it; and their representatives are, consequently, necessary parties to this proceeding; as, if it succeeds, they are still liable to a contribution.

Mr. Martin and *Mr. Hutchinson* for the existing trustees.

Mr. Dauncey in reply.

1. All the cases respecting charities granted by royal charter go the length of admitting that where there is a misapplication of the revenues, courts of equity will interfere; if so, they surely will interfere where the subject from which the revenues arise is removed or injured. 2. The facts, as they appear by the affidavits, are these:—the market has been removed to a less convenient spot. The market-house is less commodious. There is no room over it. It is not big enough to afford the necessary matter, and the persons resorting to the market are obliged to get shelter at an inn. These grounds alone would be sufficient to authorize the interference of the Court; but, independently of this, the market has been removed to land belonging to Messrs. *Porter*, who may have a right to recover it. The cases which have been cited as to this part of the case all end in a case which

(i) Mentioned in a note to
Daniel v. North, 11 East. 375.

(k) 1 Campb. N. P.
 (l) 1 Taunt.

declares the law not to be what Mr. Justice *Chambre* supposes it to have been : but all those cases are different from the present. There is a clear distinction between giving up property to the use of the public for a road, and giving it up for the purposes of a market. It is alleged that Queen *Elizabeth* granted liberty to hold the market in any place in the town ; but no language can be clearer of such a construction than that of the charter. The land was granted to the intent that the " grantees, their heirs, and assigns, might have power to found, &c. *thereupon* a market-house ;" and they were to have " licence to found, erect, and build, as well the aforesaid house, upon the aforesaid ground, as also so many and so big stalls, &c." Can any thing be clearer or more explicit than such language ? The market-house is to be erected there ; and they are to have no power to erect it any where else. If they can remove it from that spot, they can remove it to any place, however inconvenient.

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LORD CHIEF BARON.

*Gray's Inn
Hall, Jan. 13.*

This is a petition presented under the late act of parliament not to regulate the charity, but merely to administer the funds ; and the authorities, therefore, that were very properly pressed upon the attention of the Court, for the purpose of shewing that it has no jurisdiction, do not apply.

It is to be assumed, that there was no market-house at the time the charter was granted : and it does not appear by the application, of what funds this market-house was originally built. It is, indeed, a little singular that, whilst the market-house was confined to the piece of land, the liberty of erecting stalls should be granted any where within the manor. But this serves to shew that it was not important in the opinion of those granting the charter,

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where the market-house was built, although it was confined to the piece of land specified.

From the statements of the petition *Brown* could not have acted before the year 1789 : and in the year 1813, the premises were conveyed to other trustees. The representatives of *Brown's* co-trustees ought to have been made parties to the present petition. If I could have administered any relief, I should have required them all to be before the Court ; but, as I shall not give any relief on this petition, I do not think it necessary to order them to be brought here.

The respondents on the present occasion are the representatives of *Brown* ; and they state that all the trustees concurred in the act of pulling down the old market-house, with the exception of *Goring*, who took no steps to prevent it : although he might have applied, as we all know, to a court of equity to restrain the act. The new market-house was built at the expence of persons residing in the place and neighbourhood ; and the subscription shews their general concurrence. Even the parish itself contributed for the purpose ; and the parishioners, it appears, did not complain of such an application of their money, although evidently not warranted by law. It likewise appears that 400*l.* was laid out in the erection of the new building. And it is sworn, and not contradicted, that the old market-house was a great nuisance. It was, indeed, fit, in point of decorum, that it should be removed.

If all the persons interested approved of its removal, I do not think its removal a breach of trust. The trustees might have removed it to any spot within the acre, if, in so doing, they acted honestly.

It was not disapproved of by any person except *Gor-*

ing: but he has acquiesced in the removal. He has also acted under it, and does not even now complain, he not being one of the petitioners.

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I observe, that there is a vast deal said in the petition; but very little in evidence, as to the use to which the old market-house was applied. But the affidavits read, on the part of the defendants, are a complete answer to the petition on that point.

It is then said that the new market-house is not of the same dimensions as the old market-house. But what is there in the letters patent as to the size of the house? The trustees are the judges on this point; using due discretion: and it is pretty obvious that they have, in this instance, used a due discretion, as is proved by the concurrence of the persons subscribing, and of the parish.

I do not think that the evidence is sufficient to establish the fact that the new house is not built on the acre: but, to prevent all doubt, I accept of Messrs. *Porter's* offer to convey; but the conveyance must be by bargain and sale.

In the result the case comes to this: the old market-house was a great nuisance; and the trustees having the power to build another, the parishioners consenting, pulled it down and rebuilt it, all the parish signifying their concurrence by subscribing to defray the expences.

This is a peevish petition: it does not attempt to affect the other trustees, who were joint tenants with *Brown*; and who, by concurring with *Brown*, are, in point of law, equally liable.

The petition is presented nine years after pulling down

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the old market-house, and six years after *Brown's* death. Many reasons might have been assigned by *Brown* to justify his conduct, which his representatives, the respondents, are ignorant of; but which might have been decisive of the case. Can I, under these circumstances, assist the petitioners?

I repeat that this is a peevish application, confined to the representatives of *Brown* only, all the other trustees being equally liable with him, but not brought here. I shall, therefore, dismiss this petition, and that with costs.

Petition refused with costs.

*Gray's Inn
Hall, Jan. 10,
11, 29.*

DORMAN and Others v. CURREY and Others.

Clover, tares, and artificial grasses, cut green, and given to cattle employed in husbandry, are liable to tithe if the occupier have sufficient *sustenance* of any other description for their maintenance.

THIS was a bill for tithes by the lessees under the bishop of *Rochester*, of the rectory of *Dartford*, in the county of *Kent*, against certain occupiers of lands within that parish.

The principal question in the cause was, whether *clover, tares, lucerne*, and other articles of that description cut for green meat and given to horses used in husbandry, were titheable.

The charge in the bill was, "that such part of the *clover, tares, lucerne*, and other articles cut for green meat by the defendants, as had been consumed by their horses employed in husbandry, were unnecessarily consumed by such horses, and were given by the defendants

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to such horses with the intent to defraud the plaintiffs of the tithes thereof; inasmuch as the defendants had on their lands, in each of the years when they gave such articles to their horses, a sufficient quantity of fodder for such horses, exclusive of the articles so cut for green meat, and had sold and disposed of or applied for other purposes than for the food and support of their husbandry horses quantities of hay and fodder, the produce of their respective farms, which might have been consumed for food by such horses. It also charged that defendants had, in such years, sufficient pasturage on their respective lands, within the parish, for their husbandry horses; and that such horses might have been depastured thereon, but that the defendants, with the intent of defrauding, &c. used such pasturage, and permitted the same to be used for other purposes than the depasturing of their husbandry horses.

The defendants by their answers admitted, that although they had not sufficient pasturage of a proper quality upon their farms and lands, within the parish, for the support of the horses kept by them for husbandry purposes; yet that they had, and grew on their respective farms and lands, in each of the years when they gave the articles, cut for green meat, to their horses, employed in husbandry, a sufficient quantity of hay or other dry food (if such dry food was meant by the word fodder in the bill) exclusive of the articles cut for green meat, and had sold and applied divers quantities thereof for the support or food of their sheep, cows, and other stock, and for other purposes,

Mr. Martin and Mr. Roupell, for the plaintiffs.

There is no doubt that these articles, when severed, are *prima facie* liable to tithe. The only question is, whether the ground of exemption set up by the defendants

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is good. They say they are protected from the payment of the tithe of these articles, because they were given to cattle employed upon their farms for the purposes of agriculture. But, according to *Mantell v. Paine*, (a) these articles are not exempt, unless there be a deficiency of fodder. In that case the Court directed an enquiry, whether the defendant had sufficient *fodder* to support his cattle used in husbandry, without the green fodder mentioned in the pleadings. Here the defendants admit that they had sufficiency of hay and fodder, if such dry food was meant by the word fodder ;” but they say they had not sufficient pasturage. This brings the question to, whether fodder, which is the term used in *Mantell v. Paine*, (b) means dry fodder or pasturage. Upon referring to Doctor *Johnson’s* dictionary, it will be found that the word fodder is derived from the Saxon word *foðer* and the definition there given of it, is “dry food stored up for cattle against winter.” The German dictionaries also give it the same meaning. In *Cowell’s* interpreter (c) it is also stated to be derived from the same Saxon word ; and the meaning there ascribed to it is, “*Alimentum, any kind of meat for cattle, horses, &c.*” *Alimentum* means nourishment or sustenance. But this is not the only meaning there given to the word : in other places, he says, it means hay and straw mingled together are accounted fodder ; and, immediately after, he refers to the word *forage*. This shews that it must include hay ; and cannot be confined to green meat, as appears to be contended on the other side. The only authority in favour of the construction of the defendants is in *Watson’s* Clergyman’s Law, (d) where it is said, if the farmer have sufficient *grass* to maintain his cattle, tithe shall be paid. But that book is merely a compilation ; the safest way, therefore, is to examine the original authorities there

(a) 4 Gwill. 1504.

(c) P. 30.

(b) *Ante*,

(d) P. 552.

cited. The case cited on this occasion is *Crawley v. Wells*, which is to be found in 1 Roll. Abr. (c); and, upon reference to that case, it will be found the word there used is "*sustenance*," and not grass. The case of *Perry v. Soam* furnishes a direct authority for the plaintiffs in this case. Sir *Edward Coke*'s argument in that case was, Why are articles cut for green meat to be distinguished from hay? The moment hay is cut, it becomes titheable; and the farmer is not protected from the rendering the tithe of it because it is given to his cattle. But it is said the law has made a distinction; and that where there is not a sufficiency of fodder, the article cut green is protected. This is admitted: but what we contend is, that fodder does not mean pasturage, or green meat; but is contradistinguished from it. The only authority against this is in *Watson*; and the case referred to by him does not bear him out. The word there is *sustenance*, and in *Bowles v. Bowles*. (g) This Court have made use of the same word by referring to the deputy-remembrancer to enquire whether there was any *sustenance* for the cattle. In this case the defendants have admitted that they had other *sustenance* for their cattle: they say that they had sufficient hay and other dry food, which is sufficient to entitle the plaintiff to an account.

Mr. *Dauncey*, Mr. *Shadwell*, and Mr. *Pemberton*, for the defendants.

The question in this case is not whether any particular article is permitted to be eaten; but under what circumstances a man may cut and give his green meat to his cattle. It is not denied that the defendants might, if they pleased, have turned their cattle into the fields, where these articles were growing, and have let them eat every leaf of

(c) P. 645. Pl. 7.

(g) Sacc. 1811.

(f) Cro. Eliz. 139.

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them, and no tithe would have been payable. What difference can be made by the circumstance of the articles being severed? The principle of law, as applied to this case, is this:—a farmer is not bound to make his tares into hay; if he please, he may allow them to be eaten by his cattle on the ground; but if he do, the tithe is to be paid in a different way. It would then be paid in the shape of an agistment tithe; in the other case it must pay tithe as hay. But the law says that where cattle are employed on the farm, no agistment shall be paid for them, because the farm is benefitted, and the other titheable articles increased, by their labour. What substantial difference can it make if the tares, instead of being eaten on the ground, are cut and taken to the place where they are to be consumed by the cattle. In fact the tithe owner is benefitted by the removal; for if the cattle were turned into the field, they would trample down as much as they consumed, so that less benefit would result to the farm, and, consequently, to the tithe-owner, from the same quantity of green meat, than would result where they are carried off the ground. It is admitted on the part of the plaintiffs that articles so cut and used as green meat are exempted under circumstances, i. e. if the farmer have not otherwise sufficient *fodder*, which it is said means hay and other dry food; so that, according to that construction, a farmer cannot give his cattle green meat if he have sufficient hay, or even corn, on the farm. If the decision of this case depends, as has been contended, on the construction of the word *fodder*, we must look for its meaning, to more ancient authorities than modern dictionaries. *Spelman*, in his glossary, states it to be "*pabulum*," which, according to *Virgil*, and many other Latin authors, means pasturage, "*victumque feres et virgæa lætus pabula*." (h) "*Fuge pabula læta*." (i)

(h) 3 Georg. 320.

(i) *Ibid.* 385.

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The case of *Manton v. Payne* (k) is a manuscript case. It appears there that the statement in the bill was that the defendant had no clover grass, and the answer stated that the defendant cut clover grass for the necessary use of his horses used in husbandry. The passage in *Watson*, which has been alluded to, purports to be a translation of a case in *Rolle* which is in French; and shews what meaning the compiler of that book, who was a clergyman, writing to inform other clergymen of their rights, attributed to the word *sustenance*, viz. *grass*. This is also stated to be the law in *Burn*, (l) and in *Hayes v. Dowse* (m). In *Perry v. Soam*, (n) the judgment of the Court was not according to the argument of Sir *Edward Coke*, but directly the contrary way. Lord Chief Baron *Comyns*, under the head *Dismes*, says, that tithe shall not be paid of grass cut, if not made into hay; and quotes 2 *Leon*. 28. which is another report of the case of *Perry v. Soam*. He does not even consider the question of sufficiency. In *Mead v. Thurman*, (o) prohibition was granted upon suggestion of this custom, "that, for tares cut or mown before they be ripe, and given to plough cattle, tithes ought not to be paid." The same case is stated by Sir *William Jones*. (p) He says "there was a libel in the ecclesiastical court, and a prohibition;" and he expressly states the prohibition was granted, not on the general suggestion, but on the custom of the parish. These are all the cases that occur on this subject, and they afford very little information. In the absence of authorities it is necessary to recur to general policy; and it is for the plaintiffs to make out upon what principle it is, that an occupier of land may turn his cattle into a field of green tares to eat them there without rendering himself liable

(k) *Ante*

(l) 3 *Eccl. Law*, 462. s. 6.

(m) *Bunb.* 279.

(n) *Ante*

(o) *Cro. Car.* 393.

(p) *P.* 357.

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to tithe, but must render the tithe of them to the parson, if he carry them to the cattle ; and this they have failed in doing.

Mr. *Martin*, in reply.

Every decision of tithe law must have its foundation in this, that the clergyman is *prima facie* entitled to one-tenth of the produce of the soil, whatever that may be ; and that it rests upon the occupier to make out his own exemption. As soon as the articles in question here were severed, they became liable to tithe ; and it was for the defendants to have made out in what manner they are exempted. All the cases that have been cited on their behalf refer to particular customs, and not to the general law of the land.

In *Perry v. Soam* (q) the Court came to no decision upon this particular point : but, in the statement of that case, we have the opinion of Sir *Edward Coke* confirming the doctrine contended for by the defendants. It has been urged that the word sustenance in *Crawley v. Wells* (r), must mean sustenance of the species before referred to, *i. e.* grass : but the word “*sustenance*,” in the original report, is followed by the word *autrement*, which shews the meaning to be *other* sustenance. The passage which has been read from *Comyn* is a note, and not a report : he merely states, on the authority of *Perry v. Soam*, that tithes shall not be paid for grass cut and not made into hay ; but he does not state that to be his own opinion, or approve of the case. If what is contended for on the other side be law, the enquiry in *Manton v. Payne* ought not to have been, whether they had sufficient *fodder*, but whether they had sufficient daily food. It has been contended, that there is no distinction

(q) *Ante*(r) *Ante*

with regard to green meat, whether the grass is cut or not; and, to support this, a case has been cited from *Bunbury, Hayes v. Dowse* (s). Now, without saying any thing as to the accuracy of the report, let us take the case to be as stated; and to what does it amount? It merely says, "The Court seems to think, &c." which shews that the Court did not decide it; but that some of the Court threw out an opinion that this might, by possibility, furnish a good defence: but from the time when that case bears date, which is in the reign of *George II.* the opinion there thrown out has never been acted upon.

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Upon the whole, therefore, it is clear that the plaintiff is entitled *prima facie* to the tithe of these articles, on their being severed from the ground, which throws it upon the occupier to shew, either from decided cases, or from general and acknowledged principles, that they are exempted; and, in doing this, the defendants, in the present case, have failed.

LORD CHIEF BARON.

*Westminster
Hall, Jan. 29.*

This is a suit instituted against the defendant for tithes; and the single question now remaining to be decided, is, whether the plaintiff is entitled to the tithe of green grass, vetches, and tares, which have been cut and given to agricultural cattle, that is, cattle who are employed in husbandry. That tithes are due *prima facie*, for all grass that is severed from the ground, may be considered as a truism; and it has not been disputed: but whether it is titheable in the present case is a question which has not, as far as I can find, been expressly decided; and we must, therefore, look with attention to the cases which belong to this part of the tithe law, and draw from them such conclusions as seem to be the most consistent.

(s) *Ante.*

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The fact of this case, as admitted between the parties, appears to be, that the green food, if I may so call it, was not more than sufficient to feed these cattle; but that there was dry food, such as hay, for instance, in the possession of the occupier, amply sufficient. As I said before, the liability of the article to render tithe is clear *prima facie*; and it lies upon the occupier to prove an exemption, or something in the nature of an exemption, to protect him from it. He states here that, "inasmuch as the green food, thus separated or to be separated, was not more than sufficient to feed the cattle; and as those cattle were employed in agricultural purposes, and, by that means, must necessarily contribute to increase the other titheable matter, tithe could not be payable for it; and that, notwithstanding the sufficiency of other food, such as hay, &c." There is a great deal of hesitation in the earlier cases on the subject of agistment itself—there is no doubt that tithe of agistment was due from all time; but it is equally true, that the tithe of agistment was very seldom paid in many parts of this kingdom. The demand of the tithe of agistment was first made within my own professional memory; and I believe I prepared the first bill which was filed for the purpose of compelling the payment of it. It is stated in *Croke Eliz. (t)* that "*Godfrey* moved that no tithes, by the law, are payable for beasts agisted; but all the Court held that for beasts agisted for hire, or for dry cattle which are depastured to be sold, tithes shall be paid; but for dry cattle reared for the plough, or to be expended in the house, no tithes shall be paid for them." This shews that though the law was then as it is now; yet it was not, until lately, a question much in the habit of the Courts.

The first case that I find, which bears upon the present, is a case that has been cited of *Perry v.*

Soam. (u) It is a case which has been much relied upon ; but it is very difficult to know what is really the object of it, as stated in *Croke Eliz.* Whether the tares were cut and given to the cattle in a state of severance or not does not, I think, appear in a satisfactory manner. The case is also stated, though with some variation, in 2 Leonard 27.

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Then there is a case of *Webb v. Warner* (x) in the 2nd of James I. in which it is stated that " the inhabitants of divers marshes and fenny lands, who used to gather a rough hay called fenny fodder, for want of sufficient grass to sustain their beasts in winter, alleged that they did this for the sustenance of their beasts, and the better increase of their husbandry ; and ought, therefore, to be freed from the payment of tithes : and the Court held that this surmise was not sufficient, for one may not prescribe in *non decimando*. And in that it is alleged that they bestow it upon their cattle there, that is not any cause of discharge, for so they may prescribe for corn spent in their family, or for corn given for provender to their cattle, whereby no tithes should be paid."

The next case is one upon upon which a very great stress was very justly laid upon the part of the plaintiffs, *Crawley v. Wells.* (y) That case is found in 1st Rolle's Abridgment 645, *placitum* 7. It is also to be found copied in 8 Viper 586. also in 2 Danvers, but there it is copied from Rolle, so that these are mere transcripts of the passage in Rolle. It is also stated in Dr. Burn's Ecclesiastical Law : he says " it hath been resolved that if a man cut grass, but before it be made into hay, but only put into swathes, he carrieth and giveth it to his plough cattle for their necessary sustenance, not having sufficient for their suste-

(u) Cro. Eliz. 139. 2 Leon. 27.

Cro. James 47,

(x) 3 Burn. Eccl. Law, 447.

(y) *Ante.*

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nance otherwise, no tithes shall be paid thereof," and cites 1 Rolle 645, pl. 7., 2 Bunb. 279. so that we find this case repeated, first of all, in Rolle's Abridgment; then in 2 Danvers; then in 8 Viner; and then in Burn's Ecclesiastical Law.

Now this case is certainly the one which first introduced the real question, which the counsel have made in this cause. The passage in Viner is a literal translation of it: "If a man cuts grass, and before it be made into hay." There we have a cutting; in the other cases that point was certainly left equivocal. "If a man cuts grass, and before it be made into hay, but only put into swathes, he carrieth and giveth it to his plough cattle, for their necessary sustenance, not having sufficient for their sustenance otherwise, no tithes shall be paid thereof." The words in this case are, *not having sufficient for their sustenance; sustenance*, and not *fodder*, is the word used in Rolle, and in Viner, Danvers, and Burn, who have translated it from Rolle. Now that would bring the question to this point at once, What is meant by *sustenance*? But, there is a passage in *Watson's Clergyman's Law* which seems to give a meaning to the word *sustenance*; and, if that be the true meaning, to be sure the question is pretty well disposed of: but that book certainly is not very accurate; for the case it refers to in Rolle is there stated as having been decided in the second of Charles the First instead of the ninth, and in the Court of Common Pleas instead of the King's Bench. But it refers to the case in 1 Rolle's Abridgment 645; so that it is the very same case, by the same name, that is found in Rolle. Now when the author of the Clergyman's Law states a proposition, which he founds entirely upon a case which he quotes, I must look to that case: I cannot trust his construction of it, nor can I trust his translation; but I must look at it myself. It is perfectly clear he meant to rely entirely on the case in Rolle, for he does not offer any

opinion of his own : he does not offer to say that any construction has been put on the word *sustenance* ; but, as if he were translating Rolle, he says "not having *grass* sufficient to sustain them otherwise." But if we look at Rolle, we find that the words are, "and gives it to his cattle, not having sufficient for their sustenance otherwise." Now if the author of the *Clergyman's Law* be correct in saying, "not having *grass* sufficient to sustain them otherwise," it must be because *grass* is the necessary translation of *sustenance* ; otherwise, he is incorrect : but it is impossible to say that, when Rolle uses the word *sustenance*, he means *grass*, because there is not, as far as my judgment goes, the least reason for applying such a construction to the word ; therefore, I must reject what Watson says, because he only means to say what Rolle says, and Rolle says no such thing.

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Other books, and other authorities, have been referred to, upon which more stress has been laid than they deserve. In Comyn's *Digest*, title *Dimes*, p. 2. it is said, "tithe shall not be paid for grass cut in a meadow for beasts of the plough, if it be not made into hay." Now Comyn does not say any thing more by way of qualification than that ; but he refers to 1 Rolle and 2 Leonard, which certainly do not justify that apprehension ; and he gives you no other authority. Rolle says, not having sufficient for their sustenance otherwise. Comyn's *Digest* says, "tithes shall not be paid for grass cut in a meadow for beasts of the plough, if it be not made into hay ;" that is, if it is merely cut and left in the swathe, and not made into hay, no tithe shall be paid for it. He relies on Rolle and 2 Leonard, in neither of which is there any thing of authority for what he says. If Comyn had stated this, without stating any book to which he referred, I should have paid great attention to it, because his authority is considerable : but where he says, I find it so in Rolle ; we must look to Rolle ; and if the authority is

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not there, we are obliged to reject what he says, as in the other case.

Then it is said that in the case in Bunbury, of *Hayes* and *Dowse*, (s) “the Court seemed to think that vetches and clover, cut green, and given to cattle used in husbandry, should pay no tithes.” Now that is a very large proposition: in truth it is a case which ought not to have been introduced into a book of reports; because, to say what the Court seemed to think is saying nothing. It is impossible for any body to say what a Court seemed to think: and I have searched the record of that case; and there appears to have been nothing in issue as to the case before us now. But it is quite clear that the doctrine to which the Court seemed to incline, in Bunbury, is not true; namely, “that vetches and clover cut green, and given to cattle used in husbandry, should pay no tithes,” because even *Watson* says, it must be in the event of there being no other green grass. Bunbury refers to a great number of cases in the margin: *Mead v. Thurman* in Croke Charles; Sir William Jones, 2 Leonard, Croke Elizabeth 139, which I have read. He refers also to 1 Rolle’s Abridgment 645; and Degge 232.

Now *Mead v. Thurman* (a) proceeds upon a particular custom: “prohibition was prayed upon suggestion of this custom; viz. that for tares cut or mown before they be ripe, and given to plough cattle, tithes ought not to be paid:” but here we are considering the general law, not a custom.

The passage in Sir *William Jones*, to which Bunbury refers, also relates to a particular custom of the parish.

In Degge 232., It is said, “it has been resolved that

(s) *Ante.*

(a) Cro. Ch 393.

for grass cut in meadows to feed the beasts of the plough, and not made into hay, tithes should not be paid thereof;" and *Wells v. Crawley* (b) is referred to. Now *Wells v. Crawley* cannot be found in any book but Rolle: there is no reference in Degge to Rolle's Abridgment, or any other book; but he cites the case of *Wells v. Crawley*, as if he cited it as an ordinary case without referring to any other book: but if it be not in any other book, it must be the case in Rolle, and there the authority does not justify him. Then the next clause is, "It hath been resolved, that tares, vetches, &c. cut green for the feeding beasts of the plough, by custom, may be freed from the payment of tithes, but not otherwise." Then he cites Croke Charles 393., which we have read, and Sir William Jones 357.

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The next case is that of *Mantell v. Payne*: (c) there the defence was, "that the defendants gave the green food, when cut, to their cattle, for their necessary sustenance," not entering into any statement of the fact, excepting so far as you may refer the word necessary to their not having any other fodder. The Court considering the law as settled in the way in which it is stated by Rolle's Abridgment, and the other cases; that there cannot be an exemption without shewing the necessity of the thing, in the way in which the Court thought the word necessary was to be applied, referred it to the master to enquire, whether they had any other fodder for the purpose. The Court, therefore, decided thus far, namely, that merely giving it to cattle is not sufficient, as an exemption. They decided also that there must not be any other fodder; but what fodder is they have not decided: so that we have the law now as clearly as can be, that there must not be any other fodder, in order to excuse the occupier from paying the tithe

(b) *Ante*.

(c) *Ante*.

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for green grass and tares which he has given to his cattle, admitting the principle, that this produce, as well as any other produce of the earth, is titheable; so that *primâ facie* it is titheable at all events if you have other fodder. Now other fodder, it is said, on one side, means green food of the same kind: on the other side it is said any food that cattle are in the habit of receiving. We will suppose corn, which people are not much in the habit of giving to cattle, except horses, on particular occasions, would not be considered as fodder; but hay, it is said, is fodder. Now what the word fodder may be intended to mean in particular parts of the country, or in particular books, it is hardly worth while to enquire: beyond all doubt it cannot be disputed that dry food is fodder. I conceive fodder means exactly what food means;—and when I see in the great case, which declares the law upon the subject, that the word sustenance is used, I ask what sustenance is. Is not hay just as good food for the cattle as green grass? I mean in point of sustenance *per se*. Then if I find that the circumstance which would compel me to decide in favour of a *non decimando* in this case, does not exist, namely, want of sufficient sustenance; am I not justified in saying there is no reason why these articles should be excused from paying tithes?

I put out of the question the arguments which have been made use of as to the hardship of the case. They do not weigh with me: it is said it is hard a farmer should pay the tenth of this produce when, by suffering the cattle to come on the field, he would not pay any tithe at all. But that has nothing to do with the present case: in truth, the occupier has the advantage of not having his nine parts trod over, and the tithe owner has not the tenth trod over. The only question is, Can you maintain the position that this sustenance is confined to green food? and how is the Court to give directions on the subject? The construction on the word

sustenance, in *Watson*, appears to me to be attended with infinite inconvenience; and it would be impossible for the Court to give any directions concerning it. Under these circumstances I am of opinion that the plaintiff, on the statement of the fact, in the present case is entitled to a decree.

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Decree for plaintiffs.

HAYWARD v. GREENWOD and Others.

Gray's Inn
Hall, Feb. 27.


THE plaintiff, a purchaser in possession, prayed by his bill a specific performance, and an injunction to restrain the defendants, the vendors, from proceeding in an action of ejectment.

Injunction to stay trial upon merits confessed in the answer, granted after sittings although the notice of motion was only served on the day before, there being only one day of sitting.

The bill was filed on the 11th instant: the defendants appeared on the 12th, and put in their answer on the 26th. The day the answer came in, namely, the 26th, the plaintiff gave notice that he should, on the 27th, move for an injunction to restrain the defendants from proceeding in the ejectment "on the merits confessed by the said defendants by their joint answer to the plaintiff's bill, and which answer was only filed this day, and in the event of the court granting such injunction that the same may extend to stay the trial of the said ejectment at the ensuing assizes for the county of ———".

Mr. *Beames*, in support of the motion, stated, that he understood it was considered by the counsel for the defendants to be a fatal objection to the present motion, that the notice was but of one day: but he submitted, that

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it ought in this instance to be considered sufficient, as the answer came in only on the day on which the notice was given, but as this was the only day on which the Court sat; and, as he moved on the merits confessed in the answer, the defendants could not be taken by surprise.

The Court, (consisting of all the barons,) having enquired when the bill was filed, and when the defendants had appeared, said, that as the motion was made on the merits confessed in the answer, the defendants could not be taken by surprise; and that the circumstance of the Court sitting after term for a single day only ought not to be a prejudice to the suitors, which it would if a motion could not, thus circumstanced, be made.

Motion granted.

END OF PART II.

R E P O R T S
 OF
C A S E S
 ARGUED AND DETERMINED
 ON THE
 EQUITY SIDE
 OF THE
C O U R T O F E X C H E Q U E R,

COMMENCING IN THE
 SITTINGS BEFORE EASTER TERM,
 59 Geo. III. 1819.

NOEL v. LORD HENLEY.
 NOEL v. STRONG.

*Westminster
 Hall,
 Feb. 3, 4 —
 May 10, 1819.*

THOMAS VISCOUNT WENTWORTH by his will, dated *June 8, 1805*, devised all and singular his real estates, situate in the several counties of *Leicester* and *Warwick*, and to which, under the settlement made previously to his marriage with his wife *Mary* late Dowager Countess *Ligonier*, he was entitled in fee-

A testator devises a certain real estate to trustees, upon trust to sell, and out of the proceeds to pay debts, which were particularly

specified, and a legacy, and to pay the surplus after paying so much of his other just debts and legacies as his personal estate should not extend to pay to A. and B. &c.; and afterwards gives his personal estate, after paying such of his just debts and legacies as were not otherwise provided for, to his wife.

The wife died in the lifetime of the testator; and it was held that one of the debts specified which was the testator's own debt was payable out of the personal estate.

Secus Where one of the debts was not the proper debt of the testator, but of the person from whom he derived the estate in question, and was secured by mortgage on the estate.

Secus in the case of the legacy.

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simple in reversion, expectant on the limitations therein contained, to his sons successively, and their issue, in strict settlement; subject to the terms for years, and charges thereby created, and to the mortgages and incumbrances therein mentioned; and all other his real estates whatsoever and wheresoever, &c., (except nevertheless those to which he was entitled under the marriage settlement or will of his late great uncle *Thomas Rowney*, Esquire, deceased, or as his heir at law, situate, &c.; and also except certain estates then vested in him upon trust or by way of mortgage,) to trustees, viz. Lord *Henley* and Sir *James Bland Burgess*, and their heirs, upon the several uses and trusts in his will mentioned. He then gave and devised all his manors, &c. which he was entitled to under the marriage-settlement or will, or as the heir at law of his great uncle *Thomas Rowney* (subject to an annuity of 10*l.* charged thereon by the will of *Thomas Rowney*) and all his estate and interest therein to the same trustees and their heirs, upon trust that they or the survivor of them, &c. should sell and dispose of the same, and stand possessed of the monies arising from such sale, and of the rents and profits arising from such estates in the mean time; upon the trusts after mentioned (viz.) upon trust in the first place to pay and discharge the principal sum of 2000*l.* charged upon some part of the estates by means of a term of 1000 years created by the marriage-settlement of *Thomas Rowney* with *Mary Trollope* his late wife, and since assigned to *Richard Haworth*, Esquire, by way of mortgage, and all interest due in respect thereof; and in the next place to retain and pay all costs, &c. attending the execution of the trusts for sale, &c. and then to pay the principal sum of 20,000*l.* then due and owing to *Mary*, the widow of the late Lord *Robert Manners*, on mortgage of certain parts of the testator's other estates in the counties of *Leicester* and *Warwick* thereinbefore devised, with all interest thereon due and owing. And upon further trust to pay the sum of

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5000*l.* unto his wife, her executors and administrators, in part satisfaction of the sum of 10,000*l.* secured to her by the settlement made previously to her marriage with the testator out of certain trust funds therein mentioned in case of her surviving him, and failure of issue of his body by her; and the sum of 3000*l.* unto Thomas Noel, his executors or administrators; both which last-mentioned sums the testator directed to be paid as soon as sufficient monies should arise by such sale or sales as aforesaid, after the other payments thereinbefore directed to be made thereout, and that the same should carry interest at the rate of 5*l.* per cent. per annum from the time of his death. The testator then directed his trustees, out of the money to arise from the sale of the before mentioned estates, to pay so much of his other just debts, and of the pecuniary legacies by him thereafter given and bequeathed as his own personal estate, and the personal estate of his said late uncle Thomas Rowney, should not extend to pay; and after such payments to lay out and invest the residue of the said monies in real or Government securities, in their names, &c.; and to stand possessed of the same, upon the trusts thereafter mentioned, that is to say, as to one moiety, in trust to pay the interest and dividends to Thomas Noel for life, and after his death to pay unto Catherine, the wife of the said Thomas Noel an annuity of 200*l.* for her life, and subject thereto to divide the principal money of such moiety between the children of the said Thomas Noel according to appointment, and in default of appointment, equally between them; and as to the moiety, in trust to pay the interest and dividends to the separate use of Anna Catherine, the wife of Vincent Hilton Biscoe, for her life, and after her death to pay an annuity of 200*l.* to Vincent Hilton Biscoe, and subject thereto to divide the principal amongst the children of Mr. and Mrs. Biscoe, according to appointment; and, in default of appointment, equally between them.

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The testator then directed that in case neither *Thomas Noel* nor *Anna Catherina Biscoe* should have any child who should live to obtain a vested interest in the trust monies, then the whole of the residue of the monies to arise by the sales before directed to be made should with all convenient speed be laid out by the trustees in the purchase of freehold lands in *England*, which when purchased were to be conveyed and settled upon the same uses as were thereinbefore limited concerning his estates in the counties of *Leicester* and *Warwick*, comprised in his marriage-settlement; and then, after giving several specific and pecuniary legacies, the testator directed that all legacies by him thereinbefore given should be paid in full, without any deduction for the legacy duty, at such time as his executors should think fit, within twelve calendar months after his death. *And the testator gave and bequeathed all the residue of his personal estate and effects, after payment of such of his debts as were not therein otherwise provided for, and of his legacies, &c. to his wife Mary Viscountess Wentworth, her heirs, executors, administrators, and assigns, and appointed his said wife, and Lord Henley, and Sir James Bland Burgess, executors of his will.*

The testator died without making any alteration in his will, leaving his sister *Judith*, Lady *Noel*, and *Nathaniel Curson* his heirs at law.

Mary Viscountess Wentworth the testator's wife died in his lifetime, and his will was proved by Lord *Henley* and Sir *James Bland Burgess*. The present suit was instituted by Mr. and Mrs. *Noel* and Mr. and Mrs. *Biscoe* as the persons entitled to the interest and dividends of the money arising from the sale of the estates, against the trustees Lord *Henley* and Sir *James Bland Burgess*, and the other parties interested in the property, for the purpose of carrying the trusts of the will into execution.

In consequence of the marriage of one of the children of Mr. and Mrs. *Biscoe* it became necessary to bring the trustees of their marriage-settlement before the court, which was accordingly done by a supplemental bill.

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By the decree made on the hearing of the cause, on the 29th April, 1817, the will was established and the usual accounts ordered to be taken ; and it was directed that the deputy remembrancer should forthwith proceed to a sale of such of the real estates of the testator as were devised to the trustees Lord *Henley* and Sir *James Bland Burgess*, upon trust to sell, with the usual directions. The cause now came on for further directions upon the deputy remembrancer's report ; and upon this occasion the argument turned upon the following point *viz.*

*What effect the death of Lady Wentworth, the testator's wife, in his lifetime, had upon the several sums of 2000*l.* 20,000*l.* 3000*l.* and 5000*l.* by the will directed to be raised and paid out of the proceeds of the sale of those of the testator's real estates which were derived from his great uncle Thomas Rowney, or any of them. The plaintiffs and the defendants in the supplemental suit, who were the persons beneficially entitled to the monies arising from the sale of those estates, contended that the charge of those sums upon the Rowney estate was intended as a personal benefit for Lady Wentworth, the residuary legatee of the personal estate ; and that upon her death and the consequent lapse of the residuary bequest to her, the exemption of the personal estate had failed, and the sums in question were payable in the first instance out of the personality.*

The next of kin on the other hand contended ; that the testator intended a general exemption of his personal estate, and that the death of Lady *Wentworth* made no difference in the fund out of which the several sums were payable.

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Another question arose between those of the next of kin, who filled likewise the character of heirs at law, of the testator, and those who appeared simply as next of kin, as to whether, in the event of the Court being of opinion that the sums in question were to be paid out of the personal estate, so much of the proceeds of the real estate as would be sufficient to answer those sums would not result to the heir at law as part of the real estate undisposed of by the will.

It appeared by the deputy remembrancer's report that the personal estate was more than sufficient to pay the several sums in question, as well as the other debts and legacies of the testator.

It is necessary here to notice the different grounds upon which the several sums of 2000*l.* by the will directed to be paid to Mr. *Haworth*, and the sum of 20,000*l.* to Lady *Robert Manners*, and the 5000*l.* to Lady *Wentworth*, stood.

*With respect to the 2000*l.* to Mr. Haworth*, it appeared that by the settlement made on the marriage of the testator's great uncle *Thomas Rowney*, with *Mary Trollope* his wife, a term of 1000 years was created in *Thomas Rowney's* estate, and vested in trustees for raising the sum of 2000*l.*, a power of appointment over which was given to *Mary Trollope*, who by will executed that power in favour of the testator. After the death of *Thomas Rowney*, the testator, having become entitled under the settlement to his great uncle *Thomas Rowney's* estate, joined with the trustees of the term of 1000 years, in executing an indenture dated the 10th *May*, 1798, by which the term and the 2000*l.* thereby secured, were assigned to Mr. *Haworth* as a security for a similar sum of 2000*l.* advanced by *Haworth* to him; and in that deed was contained a covenant by which the testator covenanted that he, his heirs, &c., or the person or persons who for the

time being should be entitled to the immediate reversion of the estates, expectant on the determination of the term, would pay that sum of 2000*l.* to Mr. *Haworth*, his executors, administrators, or assigns. The sum of 2000*l.* so secured was the sum alluded to in the will.

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*With respect to the 20,000*l.* directed to be paid to Lady Robert Manners*, it appeared, that by indentures of the 8th and 9th of *October*, 1796, the testator had mortgaged his estates in the counties of *Leicester* and *Warwick* to Mr. *Boulbee* and his heirs for securing the sum of 15,000*l.* which was afterwards increased by a deed of further charge, of the 10th of *October*, 1777, to 20,000*l.*; and that by indentures dated in *September*, 1792, this mortgage was assigned in the usual form to Lady *Robert Manners*.

*With respect to the 5000*l.** By the settlement made upon the marriage of the testator with Lady *Wentworth* the sum of 10,000*l.* was made payable to Lady *Wentworth* out of certain funds therein mentioned, in the event of the testator dying in her lifetime without issue; and by the will the sum of 5000*l.* was directed to be paid to her in part satisfaction of this sum of 10,000*l.*

Mr. *Martin*, Mr. *Benyon*, Mr. *Newland*, and Mr. *Martin West*, for the plaintiffs in the original cause, and Mr. *Longley* for the defendants in the supplemental suit.

Mr. *Shadwell* for the next of kin.

Mr. *Dauncey*, Mr. *Wingfield*, and Mr. *Loval*, for the heirs at law, who were also next of kin.

Argument for the devisees.

With respect to the 20,000*l.*, it appears to have been money borrowed by Lord *Wentworth* himself, and to have been

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his personal debt; and as such, supposing there had been no exemption of the personal estate, the personal estate would clearly have been the first fund liable to the payment of it. *King v. King*, (a) *Cope v. Cope*, (b) *Howell v. Price*, (c) *Evelyn v. Evelyn*, (d) *Tweddell v. Tweddell*. (e)

The first point therefore to be considered is, whether the direction that this sum should be paid out of the real estate is not an exemption of the personal estate in favour of the residuary legatee? And, secondly, whether, in the event which has happened, the personal estate is not to go in the same manner as it would have done, had there been no residuary clause? *Waring v. Ward* (f) is a case very analogous to this. The principle there laid down is, that if the real estate be given to A., subject to the payment of debts, and the personal estate to B. exempt from debts; the exemption is to be considered as intended solely to benefit B., and not as a general exemption of the personal estate. *Hale v. Cox* (g) is also a very strong case in favour of the same proposition.

In this case it is perfectly clear that the exemption was intended for the benefit of the wife. If the personal estate had been given to her generally, without any exception of any part of it, it would have been the first fund applicable to pay the debts of the testator. The exception of these debts out of that fund is an advantage intended for her of which, upon the principle upon which *Pickering v. Lord Stamford* (h) was decided, the next of kin are not entitled to take advantage. The principle of that case is, that where a testator having given to his wife a provision, which he intends to be a satisfaction for any claim she may have against the other objects of his bounty, if by

(a) 3 P. Wms. 360.

(b) 2 Salk. 449.

(c) 1 P. Wms. 291.

(d) 2 P. Wms. 665.

(e) 2 Bro. C. C. 107.

(f) 5 Vez. J. 670.

(g) 3 Bro. C. C. 32.

(h) 3 Vez. 332.

any accident those objects should be unable to claim the benefit of that intention, no other person should set it up against the widow. Here we must take the exemption as intended for the benefit of the wife; and she being dead, there is a total intestacy as to the personal estate, and the next of kin are let in. The will ought therefore to be considered as if the whole of the residuary clause had been omitted, and the next of kin have no right to look into that residuary clause to raise any presumption in their favour:

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As to 2,000*l.* there is sufficient in the circumstances attending that to bring it within the same rule as the 20,000*l.*; and this must depend upon whether it is to be considered as the personal debt of the testator, which the plaintiffs contend it is. It is not intended to be argued that the mere circumstance of Lord *Wentworth* entering into the covenant would make this a debt to which his estate would be liable: but we say that his personal estate received a benefit to that extent. In the case of a mortgage made by another person; the reason why a covenant entered into by the party who assigns this mortgage does not make it a debt to be paid out of his personal estate, is because the personal estate has received no benefit whatever. But in this case the personal estate has received the same benefit as if Lord *Wentworth* had originally borrowed the 2,000*l.*, and had mortgaged his own estate as a security. This debt therefore cannot be distinguished from a debt contracted by Lord *Wentworth* himself, in payment of which his personal estate is to be primarily applied.

As to the legacy of 3,000*l.* to Mr. *Noel*, no doubt can be entertained that although the testator directs that this sum shall be a charge upon the produce arising from his real estates, yet that does not make it a sum to be paid at all events out of the real estate exempting the personal

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estate. The mere circumstance of a testator directing his real estates to be sold, and the produce to be applied in payment of debts and legacies does not make the produce of the sale of the real estates the fund primarily liable. This has been decided in the cases of *Stapleton v. Colville*, (i) *Lord Inchquin v. French*, (k) and *M'Aland v. Shaw*. (l) In the last case there were very strong words indeed to shew that the testator meant the real estate to be the primary fund; and yet Lord *Redesdale* was clearly of opinion that it was not, observing that there was no difference between a case of a charge and the case of a direction to sell for the payment of debts. The case of *Lord Grey v. Lady Grey* (m) is also to the same effect.

Upon the principle therefore of these cases this sum stands precisely in the same situation as the 20,000*l.* and the 2000*l.* Had it not been for the exemption in favour of the residuary legatee, it is quite clear that this sum would have been payable in the first instance out of the personal estate; consequently, upon the principle before stated in arguing the case as to the 20,000*l.*, the object in whose favour the exemption was made being dead, this 3000*l.* as well as the 20,000*l.* secured to Lady *Manners*, and the 2000*l.*, is payable out of the personal estates.

With respect to the 5000*l.*, Lady *Wentworth* having died before the 10,000*l.* in part payment of which it was to be raised became payable, no question can exist as to that.

Argument for the next of kin.

This will must be construed in the same way as every other will, with reference to its own peculiar context. The testator has made three distinct dispositions of three dis-

(i) Ca. temp. Talbot. 208.

(k) Ambl. 38.

(l) 2 Scho. & Lef. 538.

(m) 1 Eq. Ca. Abr. 270.

pl. 9. 1 Cha. Ca. 296.

tinct estates. He first of all devises his own estate, which may be called the *Noel* estate; then he goes on to devise the *Rowney* estate; and, last of all, the personal estate in all these parts of the will he deals distinctly with each, and never appears to mean that his manner of disposing of one subject is to affect the disposition of another.

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The question here arises upon the part which relates to the *Rowney* estate. It is observable that the devise of this estate is to two trustees, and that there are three executors; and Lord *Eldon* has said, "that it is a material circumstance in the construction of a will, to notice that when there is a disposition of an estate to trustees, and the same individuals are not the only executors, it is a circumstance to shew that every thing given to them is meant to be wholly exclusive of the personal estate." Now here the devise is to two trustees, and they are to sell, and out of the proceeds in the *first place to pay and discharge* certain debts and legacies. It is quite clear that they must pay them out of the real estate, which is the only fund over which they have any controul. This is a very material distinction, because when he afterwards speaks of his other debts and legacies, he makes use of different expressions: he says "so much of my just debts and other pecuniary legacies as my personal estate, &c. shall not extend to pay." This clearly shews that the testator knew how to express in proper terms what he intended to do in case of a deficiency of his personal estate.

The case of *Burton v. Knowlton*, (*n*) and of *Williams v. Bishop of Landaff*, (*o*) are very strong in favour of the next of kin. In that of *Hancox v. Abbey* (*p*) the resemblance of the will to that of the testator in this case is very striking.

There the question arose between the devisees of the

(*n*) 3 Vez. J. 107. (*o*) 1 Cox. 254. (*p*) 11 Vez. 179.

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next of kin only: but in this case there are other parties who are affected by the bequests in question, namely, the taker of the estates in *Warwickshire* and *Leicestershire*; and it is evident upon the face of this will that these sums of 20,000*l.* and 2000*l.* were directed to be paid out of the *Rowney* estate, not for the benefit of the wife, as has been contended, but for the benefit of those persons who were the devisees of the *Warwickshire* and *Leicestershire* estates, which would otherwise have been liable to the payment of them.

In the commencement of his will, in which he mentions his estates in the counties of *Leicester* and *Warwick*, he takes notice that they are subject to the terms for years and charges by his settlement created, and devises them subject to the charges in that settlement. He then proceeds to devise the estate he derived from his uncle *Thomas Rowney*, which has been called the *Rowney* estate, to trustees upon trust to sell and apply the money upon certain trusts, and amongst others in discharge of the sum of 20,000*l.* and 2000*l.* which he notices as being charged upon his other estates. This shews that he intended those to whom he had devised the *Leicestershire* and *Warwickshire* estates should have the benefit of this money, and not merely his residuary legatee.

This case therefore differs materially from that of *Waring v. Ward*, (q) which has been cited. There the question arose solely between the heir at law and the next of kin; and it is remarkable that in that case there is no express direction that any one particular estate should bear a charge in favour of another; but it seems to have been supposed from the residuary clause in the testator's will, that the testator had in fact given to his wife his personal

estate exempt from the payment of debts; whereas it is not very clear but that a doubt might be entertained, whether such was the effect of the will, and whether, if the wife had lived, the devisees might not have had an equity against her to pay the mortgage out of the personal estate. There is another remarkable feature attending the case of *Waring v. Ward*. It does not appear from the report of it that any case was quoted in argument which goes to support the general proposition which Lord *Alvanley* assumes to be perfectly clear, although he is made to say, "I could refer to many cases, and one before Lord *Thurlow* quite analogous, in which this has been determined." Now there is no case before Lord *Thurlow* at all analogous, except *Hale v. Cox*, and that has no bearing on the question in *Waring v. Ward*, because in *Hale v. Cox* the parties were blended together: they came to give up rights, and the decision of the court in such a case cannot be considered as a decision which will bind the court in a case so momentous as the present.

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Lord *Alvanley* is also represented as saying that *Pickering v. Lord Stamford* is analogous in principle: but in that case the question was whether the widow could claim as next of kin. And it was held that she was not to be barred by the words of exclusion, because it was said, that inasmuch as the property was not in point of law given away from her, the words of exclusion should not operate to debar her of her proper and legal interest. That was the decision in *Pickering v. Lord Stamford*; but it is nothing like the decision in *Waring v. Ward*, so far as that decision is meant to be referable to the present case. It may certainly, in some respects, be said to be referable to *Waring v. Ward*, because in that case there is no specific direction that the mortgage shall be paid out of the personal estate: yet it was meant to be inferred from the words giving the personal estate, that the wife was to take the personal estate exonerated of the mortgage. This is the only

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analogy between the cases : and *Pickering v. Lord Stamford* may be looked through in vain to find any analogy to the present. In this case there is a direction, that money, to arise from a certain source, shall be applied for the benefit of the trustees of the *Leicestershire* and *Warwickshire* estates ; and the question is not, whether a benefit intended personally for the wife should on her death go to the next of kin ; but whether the court will say that the accidental circumstance of the death of some of the persons intended to be benefitted is to induce them to disturb arrangements which affect the interest of others whose benefit was equally contemplated.

Argument for the heirs at law.

If the court should be of opinion that the personal estate is to bear all these charges, we say they no longer exist as charges upon the real estate ; and that the heirs at law are therefore entitled to so much of the proceeds of this real estate as would have been required to answer these charges had they continued to exist. The residuary devisee can take nothing but what is given by the will ; and the heirs at law must therefore take all that by the circumstance of the death of the party for whose benefit it was intended, is thrown upon the personal estate by way of resulting trust. In *Cambridge v. Rous* (r) the Master of the Rolls says, " It has been long settled, that a residuary bequest of personal estate (for it is otherwise as to real) carries not only every thing not disposed of, but every thing that in the event turns out not to be disposed of. A presumption," he says, " arises for the residuary legatee against every one except the particular legatee ; the testator is supposed to give it away from the residuary legatee only for the sake of the particular legatee. In case of lapse of real estate the heir at law takes : but in the case of personal property the residuary legatee is pre-

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ferred either to the next of kin, or the executor." In *Arnold v. Chapman*, (s) which was the case of a bequest out of real estates in favour of a charity which was void by the statute of Mortmain, the court held that it was a resulting trust for the heir at law. The result of all the cases is, that where there is a gift of a real estate to trustees upon trust to sell and thereout to pay certain sums, and any of those purposes fail, the residuary devisee of that fund does not take it, but the heir at law, *Arnold v. Chapman*, (t) *Cruse v. Barley*. (u) This proposition cannot be laid down more broadly than it is, both by Lord Eldon and Lord Redesdale, in *Tregonwel v. Sydenham*. (v) The inference to be drawn therefore, is that what the court has to dispose of in this case is the *Rowney* estate minus the sums charged upon it. If the court say that the personal estate was exonerated, the next of kin are to have the benefit: but if the personal estate was not exonerated, the heir at law is to reap the advantage. This observation will apply as well to the 20,000*l.* and 2000*l.*, as to the legacy of 3000*l.* to Mr. Noel. With respect to the devise of 5000*l.* to the testator's wife; whatever may be the opinion of the court as to the other sums, this sum must be raised for the benefit of the heirs at law; because the residuary devisee cannot take it as residue. This is governed by the case of *Cruse v. Barley*. In that case the real estate was given to trustees to sell, and out of the proceeds to pay debts and legacies: a legacy of 200*l.* lapsed; and the consequence was, the heir at law was held to be entitled. How is the present case to be distinguished from that? Here is a direction to pay 5000*l.* to Lady *Wentworth*: she dies, and money never is payable to her; the devisees never were intended to have it; they were to take the estate after payment of that sum. The consequence is, that the sum in question must go to the heirs at law.

(s) 1 Vez. 108.

(t) *Supra*.

(u) 3 P. Wms. 20.

(v) 3 Dow. 194.

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Mr. Martin in reply.

The purpose for which the will was made, was either to exempt the personal estate from the sums in question in favour of Lady *Wentworth*, or else to charge the *Rowney* estate with them as auxiliary to the personalty. In either of these cases the *Rowney* estate will not be the fund to bear them.

If we look to the intention of the testator, he tells us, my 'intention is that my wife shall not out of the personal estate be called upon to pay these sums which are charged upon my *Leicestershire* and *Warwickshire* estates. Neither shall the persons in whose favour I have devised those estates.' But does it follow because the wife was not to pay it out of the personalty, that there is any thing to exempt those who take the personalty in consequence of the wife's death? Then if there be sufficient personalty to free the *Leicestershire* and *Warwickshire* estates, the devisees of that estate have all the benefit intended them, and so far the intention is answered.

But it is said that these sums are to be raised at all even out of the land; and being sums to be raised out of the land, they are to be considered as so much land undisposed of, and consequently as a resulting trust for the heirs at law. If it can be considered that these are sums to be raised at all events out of the land, the case of *Ackroyd v. Smithson* certainly applies: but this is not that case. There the direction was, at all events to sell and divide the produce amongst persons who, being tenants in common, could not take by survivorship and therefore of necessity the share of the one dying was undisposed of: but even in that case, it is to be recollected, that till the argument of Lord *Eldon* induced Lord *Thurlow* to review the opinion of the Master of the Rolls, the law was considered as settled the other way. But the question

here is—are these sums to be raised in all events? Suppose the testator had in his lifetime paid off part of the mortgages of 20,000*l.* and 2,000*l.*—would the words in the will have been imperative on the trustees to raise the whole of those sums? Certainly not.—It is quite clear, therefore, that the intention was not to raise those sums under certain circumstances; we say, that he has made this disposition of his property with the view of preventing that which is the natural fund from bearing the burden, and the disposition thus made has been defeated by the death of the wife, and therefore the money is not raisable.

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With respect to the principal point, this case is not, I think, distinguishable from that of *Waring v. Ward*. Upon the principle of that case, if the personal estate was intended to be exempted, it was an exemption in favour of the Lady *Wentworth*; and that exemption having failed, the necessary consequence is, the assets must be applied in the same manner as they would have been if no such exemption had been made. The result is, that the debts must be paid out of the personalty, as there is sufficient for the purpose. The takers of the *Leicestershire* and *Warwickshire* estates have nothing to complain of, as no purpose of the testator with respect to them is defeated. Then what has the law cast upon the parties? The direction is to sell to pay certain debts; we have a right to say the debts do not exist, because there are ample funds to satisfy them, so that this part of the trust is no longer to be performed; and we submit that the *hæres factus* is entitled to the same benefit as the *hæres natus* would have been entitled to, had the estate descended to him.

LORD CHIEF BARON,

I am considerably at a loss, at present, to find out what interest the heirs at law have in this question. If the personal estate is exonerated, the burden lies on the real

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estate; if the personal estate is to be applied, it is because the charge of the 20,000*l.*, and of the other debts, is merely on the real estate, in aid of the personal, otherwise the personal estate cannot be applied; and I never till now heard it argued that, in a case such as this, the heir at law is to stand in the place of the creditors on the real estate. The case of *Achroyd v. Smithson*, (a) which is the origin of this question, is quite different from the present case. It was the case of a sale of a real estate out and out, for the purpose of converting it into a fund to be divided amongst certain persons. One of the devisees had 200*l.* given to him, and died in the lifetime of the testator; and it was held that the 200*l.* formed part of the real estate. That cause was originally heard before Sir *Thomas Sewell*; and he was of opinion, adverting to *Cruse v. Barley* and other cases, that it was personal estate. Lord *Eldon*, who was then a very young man at the bar, was extremely dissatisfied with that decision, and advised an appeal: but his clients did not attend to him; but some other party in the cause, fortunately for justice, was advised to appeal, and that brought the case before Lord *Thurlow*. After Mr. *Kenyon* and the other counsel had been heard, Lord *Thurlow* was satisfied the decree was right: but on his asking Mr. *Scott*, who then appeared before him for the first time, what he had to say in favour of the claim of the heirs at law, Mr. *Scott* argued the case of his clients so ably, that Lord *Thurlow* said, I thought at first that Mr. *Scott* was clearly wrong, but now I see he is right; and then the decree was made, which has since been followed in all the cases which have been cited. That case, however, is very different from this, because there the real estate was not given to any body else, so that there was nobody to take the legacy but the heir at law: but in this case there

(a) 3 Bro. C. C. 503.

is only a charge on the real estate, to pay certain debts, so that you might as well say that all the other debts which are thrown on the real estate, in case the personalty will not pay them, are so many trusts for the heir at law. Such a doctrine was never heard of; and yet you cannot raise the question, without saying that the personalty is accountable, and that the provision made by the will is only to charge the real estate in aid of the personalty.

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With respect to the other question I feel considerable embarrassment. The primary fund for the payment of all debts is the personal estate; and, according to *Waring v. Ward*, if the personal estate is given to a legatee discharged of debts, and the legatee dies in the lifetime of the testator, the indulgence extended to him is taken away; and it is considered that the testator died intestate as to the residue of his estate, not that the residuary clause is expunged. It still continues part of the will, and you may look into it for the intention of the testator; and according to *Waring v. Ward* the intention of the testator is in favour of the residuary legatee, who being dead, cannot receive the benefit intended for him, and, therefore, the personal estate is discharged from the proposed intended exoneration. In this case the testator has devised his *Leicestershire* and *Warwickshire* estate to particular objects; and I agree with the counsel for the next of kin that he intended to benefit that estate: but that does not go far enough, unless he has thrown his debts upon the *Rowney* estate in such a manner that they cannot be considered as payable out of any other. If the testator had said, I devise the *Rowney* estate to pay a particular debt, which I intend shall not be paid in any other way, that estate would have been solely applicable to the payment of that debt: but he has not done so here. He has given the estate to trustees to sell, and a fund is formed by the purchase money out of

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which the costs are to be paid. He then proceeds to give a direction for the payment of parcels of this money, which is in truth, according to my view of the case, only a charge for the payment of debts, and cannot be considered as a charge upon the real estate in exoneration of the personalty. Indeed, the testator makes use of a very singular expression for a person who intends to discharge and exonerate his personal estate. He bequeaths the sum of 5000*l.* to his wife, her executors and administrators, and 3000*l.* to *Thomas Noel*, his executors or administrators, both which last mentioned sums he directs to be paid as soon as sufficient monies shall have arisen by such sale or sales aforesaid, after the other payments thereinbefore directed to be made thereout, and that the same shall carry interest from his death at the rate of 5*l. per cent. per annum*; and then he directs his trustees to pay and discharge so much and such part of his just debts, and of the other pecuniary legacies by him thereafter given and bequeathed, and which he should thereafter give and bequeath, by any codicil or writing under his hand, as his personal estate not thereafter specifically bequeathed, and the personal estate of his said uncle *Thomas Rowney*, should not extend to pay. Beyond all question he meant by this to charge his estate with the payment of all such debts, excepting those mentioned before, which his personal estate should be insufficient to pay; and then he concludes,—“And all the rest, residue, and remainder of my personal estate and effects, after payment of such my debts as are not herein otherwise provided for, legacies, and funeral and testamentary expenses, I give and bequeath to my said dear wife.” Now, I have no doubt in my own mind that he meant by these words to exonerate some part of his personal estate from its liability to pay some of his debts; but it is difficult to say what debts. He says all the rest and residue, which shall remain after payment of his debts not before otherwise provided for. Now they are

all before provided for.—But it is said that he means the 20,000*l.* and the 2000*l.* only. He gives no intimation that such is his meaning. Admitting, however, that it is so,—does it not appear from these words that he supposed that if he had not exonerated his personal estate from these debts, they must have fallen on it? If you impute to him that intention, there is an end of the supposition that he intended to confine the payment of them to the real estate. This is the way in which the case strikes my mind: but as it is a question of a singular nature, involving large amount as to property, I will take further time for the consideration of it.

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The only points remaining in this cause to be decided *May 10, 1819;* are, whether the personal estate is exonerated from the payment of debts and legacies, or of any debts or any legacies; and particularly whether in certain cases the sums directed to be raised out of the real estate are to be considered as descending to the heir at law, or whether they have become a part of the residue of the estate belonging to the devisees. These questions must be decided by a strict attention to the will.

The testator, Lord *Wentworth*, had unquestionably two estates: the one called the *Rowney* estate came to him from Mr. *Rowney*, a relation, and the other was part of his family property. He also had from Mr. *Rowney* a personal estate; and by his will he directs that if any part of that personal estate was laid out in the purchase of land, it should be turned into money, and considered as part of his, the testator's, personal estate; and bequeaths it to his executors, to be by them applied in or towards payment of his debts and legacies: so that it is clear that whatever personal property he received from Mr. *Row-*

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ney, whether it continued in the shape of personality, or was invested in real property, was to be considered as the personal estate of the testator, and was given to his executors to be applied in payment of his debts and legacies generally. He then devises the *Rowney* estate to trustees, to sell and apply the rents and profits till sale, and the produce of such sale in the manner after mentioned.

The first payment is to *Richard Haworth, Esq.* of 2000*l.* to discharge a mortgage which belonged to him. Now, this 2,000*l.* cannot, I think, be fairly considered as the testator's own personal debt: it was a debt upon the estate before it came to him, and I am not aware that he had by any dealing with that estate fixed himself with any personal liability to the payment of that debt, so that it must be considered as a debt to be paid out of the produce of that gift, and is to be distinguished from a debt to which he might have made himself liable by covenant.

The next thing to be paid is the expense of the sale; and then he directs a sum of 20,000*l.* to be paid to the Dowager *Lady Manners*, which seems to have been his own personal debt. He then gives 5000*l.* to his wife, who died before him, and 3000*l.* to the Rev. *Thomas Noel*; and directs that both such sums should be paid, as soon as sufficient monies should have arisen by the sale or sales before directed to be made, after the other payments thereafter directed to be made thereout, with interest. Then follow the words "And also to pay and discharge so much and such part of such of my just debts and other bequests and legacies by me hereinafter given, and which I shall give by any codicil or writing under my hand, as my personal estate not hereinafter specifically bequeathed, and the said personal estate of my said late uncle *Thomas Rowney, Esq.* shall not extend to pay and

satisfy." This clause certainly does seem to direct that this real estate shall be only considered applicable in aid of the personal estate, if the personal estate be not sufficient to pay all, so that, unless there is something afterwards in the will to the contrary, which I think there is not, this part of the will appears to direct, though it is not very clear, that a regular distribution should take place.

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The residuary clause certainly contains no general exoneration: it is merely a bequest to the wife of such personal estate as should remain, after the payment of debts, &c. not otherwise provided for, which certainly cannot be considered as a general exoneration. It is equally clear that it was a bequest for her benefit. In all cases the personal estate must be considered as the primary fund, unless expressly exempted, not because a testator intends it should be liable, but it is liable without any expression of an intention on the part of the testator that it should be so; and it requires a clear expression of intention on the part of the testator to discharge it of its liability. Now the wife being dead, the person for whose benefit the bequest was intended is gone, and there is no legatee, so that it has lapsed, therefore, in the construction of this will, it must be expunged from it, which brings it within the case of *Waring v. Ward*. In that as in this case there was an intention to exonerate in favour of a particular legatee; but the legatee intended to be favoured having died, the estate was applied exactly as if nothing had been said respecting the application of it. It therefore does seem to me, that in this case, whatever the real intention of the testator was, judging, as I must, from the words of the will, there is no intention of a general exemption expressed. There is nothing but a personal exemption, of which there is no one to take advantage, and therefore the testator must be considered as having died, without giving his personal estate in any particular manner.

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Debts and legacies certainly stand upon a very different footing ;—debts are *prima facie* to be paid out of the personal estate, legacies may be paid either out of the personal, or out of the real estate, according to the intentions of the testator ; therefore such legacies as are not thrown upon the personal estate are not to be paid out of it. The effect of this will be that the 3000*l.* to Mr. Noel must be paid out of the *Rowney* estate.

With respect to the 20,000*l.* to Lady *R. Manners*, if it is (as I think it is) the debt of the testator, it must be paid out of the personal estate. Having once established the proposition that the personal estate is first to be applied for the payment of the debts, and if it be sufficient to pay the whole of it, then this debt, as well as the others, must be paid out of it ; and the whole benefit of the real estate goes to the devisees. If the personal estate be not sufficient to pay the debts, or any part of them, then they must be paid out of the real estate. It is like the ordinary case of a testator giving his personal estate to *A. B.*, and his real estate to *C. D.*, subject to the payment of his debts. *C. D.* takes the real estate, subject only to so much of the debt as the personal estate is insufficient to pay ; and the circumstance of the testator having enumerated particular debts makes no difference. I cannot make any distinction in my own mind between a direction that real estate shall be chargeable with a particular debt of 20,000*l.*, and a devise of real estate, subject to all the testator's debts ; for the 20,000*l.* is only part of those debts.

In this view of the case it seems to me that the arrangement which should be made in this case is, an application of the personal estate to pay the debts of the testator ; and then of the produce of the sale of the real estate, the surplus of which is to go to the devisee.

With respect to the 5000*l.* to Lady *Wentworth*, that is excluded out of the personal estate, and I should think would, if she had lived, have been raisable out of the real estate only. The legacy of 3000*l.* to Mr. *Noel* seems to stand upon the same ground, with the exception that he is living and ready to take it: but it is to be taken out of the real estate, and not out of the personalty.

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His Lordship afterwards said, that as the 5000*l.* to Lady *Wentworth* was given in satisfaction of a debt which would have become due if she had survived the testator, but which, in consequence of her death did not arise, and that it ought not to be raised,

May 10, 1819.—And the Court doth declare, that the net amount of the rents and profits of the testator's devised real estates which accrued due between the 17th day of *April*, 1815, (the day of the decease of the said testator,) and the 17th day of *April*, 1816, after making all usual allowances thereout, and deducting therefrom the sum of 90*l.*, the amount of a year's interest on the mortgage debt to *Richard Haworth*, (deducting property tax,) and the sum of 134*l.* 17*s.* 4*d.*, the amount of the costs paid by the said defendants, *Morton*, Lord *Henley*, and Sir *James Bland Burges*, to their solicitors for business done, as to the said trust estate, up to the time of filing the plaintiff's

bill be made principal money, and be added to and form an aggregate fund with the principal monies produced by sale of the said testator's said real estates. And this Court doth further declare that the plaintiff, *Thomas Noel*, is entitled for his life to one moiety of the rents and profits of the said devised estates accruing between the said 17th day of *April*, 1816, and the times of the purchasers of the said estates being let into possession thereof, and also to one moiety of the dividends or interest which have accrued or shall accrue in respect of the stocks or funds in which the monies arisen or to arise by sale of the said estates, have been or shall be invested, and that the

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plaintiff *Anna Catharina Biscoe* is entitled for her life to the other moiety of the same rents and profits, dividends and interest, for her separate use. And it is hereby referred to the said Deputy Remembrancer to look into the third schedule to his said report, containing an account of the rents and profits of the testator's real estates, received by the defendants, his trustees; and also to look into the fourth schedule to his said report, containing an account of the said defendants' payments and allowances in respect of the said real estates, and ascertain the net amount of the rents and profits of the said estates, received by the said defendants, which accrued between the testator's decease and the 17th day of *April*, 1816, after making the allowances and deductions hereinbefore mentioned. And it is ordered that what the said Deputy Remembrancer shall find to be the net amount of such last mentioned rents and profits be paid by the said defendants, *Morton*, *Lord Henley*, and *Sir James Bland Burges*, out of the sum of 4872*l.* 10*s.* 9*d.*, the total balance of rents and profits in their hands, into Court in trust in this cause. And it is further or-

dered that the said Deputy Remembrancer do thereupon lay out and invest the same in his name, in the purchase of Bank 3*per cent.* consolidated Bank annuities. And it is further ordered that the stock to be purchased therewith be carried to the credit of the account, intituled "The produce of the trust estates of the Right Honourable *Thomas*, Viscount *Wentworth*, deceased." And it is further ordered by the Court that the said defendants, *Lord Henley* and *Sir James Bland Burges*, do pay one moiety of what shall remain of the said sum of 4872*l.* 10*s.* 3*d.*, balance of rents (first retaining the legacy duty thereon,) to the plaintiff *Thomas Noël*, and do also pay the other moiety thereof (retaining the legacy duty thereon) to the plaintiff, *Anna Catharina Biscoe*, for her separate use. And the Court doth further declare that the sum of 2000*l.*, the said mortgage debt to the said *Richard Haworth*, by the testator's will directed to be paid out of the monies to arise by sale of the said real estates, and all interest due on such debt at the testator's death, or which hath since become due, and shall become due thereon, until actual pay-

ment thereof, (save the said sum of 90*l.*, the amount of the interest which accrued due during the first year after the testator's decease, which is hereby directed to be satisfied out of the rents and profits of the said estates during that period,) *and also the legacy or sum of 3000*l.* by the testator's will directed to be paid to the plaintiff, Thomas Noel, out of the monies to arise by sale of the said estates, and all interest thereon at 5 per cent. per annum, from the testator's death, until the time of payment thereof, and also the legacy duty at the rate of 10*l.* per cent. payable to government in respect of the said legacy, or sum of 3000*l.*, and the interest thereof, be respectively raised and paid out of any of the monies produced by sale of the said testator's said real estates. And it is further ordered and decreed by the Court that it be, and it is hereby referred to the said Deputy Remembrancer to compute subsequent interest from the date of his said report on the said two sums of 2000*l.* and 3000*l.*, and that the said Deputy Remembrancer do, when he shall have computed such interest, add the same to he principal sums and interest*

already computed, and the amount of the said legacy duty, and make a certificate thereof. And it is further ordered that the said Deputy Remembrancer do make sale of so much of the said 27,769*l.* 10*s.* 6*d.* Bank 3 per cent. consolidated annuities, standing in his name in trust in this cause "The separate account of Mr. George Phillip's purchase," or as may from time to time remain in Court in respect thereof, as will produce the amount of what he shall so certify as the total amount of such sums and interest, and legacy duty, and pay to the said plaintiff, Thomas Noel, what he shall find to be the amount of his said legacy and interest, and to the said Richard Haworth the amount of his said mortgage debt and interest. *And it is further ordered by the Court that the said Richard Haworth do on such payment being made to him bring into Court, and leave in the hands of the Deputy Remembrancer upon oath, all deeds and papers relating to the said mortgage security. And the Court doth further declare that the principal sum of 20,000*l.*, the mortgage debt directed by the testator's will to be paid to Lady Robert Manners, &c. and all*

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interest thereon accrued due, previously or subsequently to the death of the said testator, shall be paid out of the testator's personal estate, not specifically bequeathed; and if the same shall prove insufficient for that purpose, then that the deficiency ought to be made good out of the principal monies produced by sale of the testator's devised real estates. *And the Court doth further declare that the sum of 5000*l.* given by the said will of the said testator, unto his (the said testator's) late wife, Lady Wentworth, in part satisfaction of the sum of 10,000*l.**


secured to her by the settlement made previous to the said testator's marriage with her, out of certain trust funds therein mentioned, in case of her surviving the said testator, and failure of issue of the body of the said testator by her, *is not a resulting trust for the heir at law* of the said testator, and that the said sum ought not to be raised and paid to them, but that the same ought to sink for the benefit of the several persons entitled to the said devised estates of the said testator, under his said will.

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An equitable mortgage, by a deposit of title deeds, established against the claim of the Crown under an extent.

By indentures of lease and release, dated the 8th and 9th of *January*, 1808, in consideration of a marriage intended to be solemnized between *Francis Adams* and *Mary Shute Manly*, a certain close of land in the parish of *Clifton*, in the county of *Gloucester*, called *Upper Honey Pen Hill*, and also two undivided third parts of another close of land near *Clifton*, were conveyed to the plaintiffs *Robert Matthew Casberd* and *John Lowe*, upon certain trusts therein mentioned, with a power to them to sell and dispose of the premises with the consent of *Francis Adams*, to such persons as they should think fit.

In 1812 the plaintiffs, as trustees, entered into a treaty with Mr. *Jones*, one of the defendants, for the sale to him of the abovementioned close, called *Higher Honey Pen Hill*, for 8000*l.*; and an agreement to that effect was accordingly prepared and signed by *Francis Adams*, and the plaintiffs, and the defendant *Jones*, dated the 14th of *August*, by which it was agreed that the payment of the 8000*l.* should be made in the following manner, *viz.* 800*l.* by way of deposit, on the day of the date of the said agreement, the further sum of 1200*l.* on the 29th of *September*, 1812, and 6000*l.*, the residue of the 8000*l.* on the 25th of *March*, 1813, bearing interest from the 25th of *December*, 1812. The 6000*l.* was to be secured by the joint bond of the defendant *Jones*, and some other responsible person

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Shortly after this agreement the defendant *Jones* offered to purchase the two undivided third parts of the other close, comprised in the settlement called *Lower Honey Pen Hill*, for 1000*l.* which offer was accepted; and it was thereupon agreed that the *Higher Honey Pen Hill* premises, and the two-third parts of the *Lower Honey Pen Hill*, should be included in the same conveyance; but that the sum of 1000*l.*, the consideration of the purchase of the *Lower Honey Pen Hill* premises, should be secured by a bond and an equitable mortgage, by the deposit of the title deeds of a certain house belonging to *Jones*, situate in *Dowry Square, Clifton*.

The 8000*l.* for the *Higher Honey Pen Hill* was paid according to the agreement; and on the 20th of *January*, 1814, *Jones* delivered to the trustees a bond under his hand and seal, and duly stamped with a proper mortgage stamp, whereby he bound himself in the penal sum of 2000*l.*: the condition of which, after reciting that the title deeds of the premises in *Dowry Square* had been delivered by *Jones* to the plaintiffs, by way of de-

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posit for securing the said sum of 1000*l.* and interest, was declared to be, that if *Jones* paid the money on the day therein named, with interest thereon half-yearly, the said bond should be void. At the time of the execution of the bond, *Jones* delivered the deeds in question to the plaintiffs, and the receipt of them was duly acknowledged by the plaintiff *Lowe*.

In December 1814, in consequence of *Jones*, who was a collector of taxes in the parish of *Clifton*, having become a bankrupt, an extent was issued against his property, under which the premises in *Dowry Square* were seised for the benefit of the Crown. At the time the bond was executed, and the title deeds deposited, *Jones* was not indebted to the Crown, nor was he liable to any process of extent. He had remained in possession and receipt of the rents and profits of the premises in *Dowry Square*, until the extent was issued against him.

The Sheriff, instead of putting the property up to public sale, contracted with Mr. *Danvers Ward*, one of the defendants, for the sale of the house in *Dowry Square*, for the sum of 1000*l.*: but Mr. *Ward* afterwards refused to perform the agreement, unless the plaintiffs would agree to join in the conveyance of the premises, and to deliver up the title deeds, which they refused to do, unless they were paid the 1000*l.* and interest, which they considered as a lien on the premises, and which they contended ought to be paid in preference to the debt of the Crown.

The present suit was instituted for the purpose of establishing the equitable lien of the plaintiffs upon the property in question, in opposition to the claim of the Crown.

The bill prayed, that it might be declared that the plain-

tiffs were entitled under the bond, and the declarations therein contained, and the deposit of the title deeds accompanying the same, to be considered as equitable mortgagees of the house in *Dowry Square*, for securing to them the payment of the said sum of 1000*l.* and the interest due in preference and priority to the right of the Crown, or of His Majesty's *Attorney General*, under the extent, and the proceedings grounded thereon, and that the benefit of the plaintiffs' mortgage might be secured to them accordingly; and that what, upon taking an account, should appear due for principal and interest on their security, might be paid to the plaintiffs, who, in that case, offered to deliver up the title deeds in their possession to the defendants, or else that the contract for the sale of the premises to Mr. *Danvers Ward*, might be performed, and the plaintiffs paid the amount of the principal and interest out of the purchase money, in preference to the debt claimed by the Crown. The bill also prayed that in case the purchase money that might arise from the sale of the premises should not be sufficient to pay the whole of the incumbrance, then that an account might be taken of the rents and profits received by the *Attorney General* since the extent issued, and that the plaintiffs might be thereout satisfied so much of the mortgage money as the purchase money should be insufficient to pay.

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Mr. *Jervis* and Mr. *Roupell* for the plaintiffs.

Mr. *Solicitor General*, Mr. *Dauncey*, Mr. *Mitford*, and Mr. *Wilbraham*, for the *Attorney General* and the other defendants.

LORD CHIEF BARON.

The facts in this case are not numerous, and the law arising upon those facts is very clear and satisfactory. the following facts:—The plaintiffs (it is immaterial in

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The defendant *William Jones* was, on the 21st of *May*, 1814, and had been for a considerable time, and from a period long before the beginning of the year 1814, collector of the assessed taxes in *Bristol* and the neighbourhood. On the 21st of *May*, 1814, a writ of extent issued against him;—the premises in question, which are in *Dowry Square*, were seized into the hands of the Crown. On the 16th of *July*, 1814, those premises amongst the other estates of Mr. *Jones* were ordered to be sold by this Court pursuant to the act of parliament (a). By the order for sale some observations having been made upon the words of the order, I therefore take notice of it here:—by the order for the sale, the equities of redemption amongst other interests of Mr. *Jones* were ordered to be sold: but it seems that Mr. *Jones* had other estates subject to incumbrances; and, therefore, the words equities of redemption may be properly applied to those interests, and not to those interests which it may be alleged he had in the present premises. On the 18th of *May*, 1815 the Deputy Remembrancer pursuant to the order of the 16th of *July*, 1814, sold these premises to the defendant, *Danvers Ward*: but Mr. *Ward* declined to complete his purchase, because the plaintiffs Mr. *Casberd* and Mr. *Lowe* claimed an interest in the property, which they of course would not release without being paid that which they claimed to be due to them, and for which they insisted upon a lien;—this they insisted upon as an equitable mortgage or incumbrance to the extent of one thousand pounds and interest. As they refused to join in a release to the purchaser, he refused to complete the purchase, and the agreement is at present incomplete, and lies in the Deputy Remembrancer's office. Nothing being done, the present plaintiffs filed their bill to enforce their claim, and they insist upon their right to be paid the 1000*l.*, and interest out of the estate upon

(a) 25 *Geo. 3. c. 35.*

the following facts. The plaintiffs (it is immaterial in what right) sold and conveyed to the defendant *Jones*, divers lands and tenements, and amongst others the premises in question, for the sum of 9000*l.*; and they received from Mr. *Jones* the sum of 8000*l.*, part of the purchase money. It was agreed, however, between the plaintiffs and Mr. *Jones*, that he should not pay the whole of the 9000*l.* at that time, but should retain 1000*l.*, the remainder of the purchase money; and it was farther agreed, that in order to secure the payment of that sum, he should execute a bond for the amount, and should also deposit the title deeds relating to the premises in question. The bond was accordingly executed on or before the 20th of *February*, 1814, and delivered on that day to the plaintiffs, and the deeds were also deposited with them at the same time. Upon this deposit it is, that the question arises.

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There is no doubt with respect to the integrity of the transaction. It has not been suggested that the plaintiffs knew more of Mr. *Jones's* situation than any stranger might have known. He was certainly collector of the assessed taxes: but it does not appear that the plaintiffs were at all cognizant of that fact,

The question which arises upon these facts is, whether the plaintiffs are or are not equitable mortgagees by reason of this deposit of the title deeds? This case is relieved from the difficulty which has arisen in other cases, which depend upon the parol evidence of the deposit, for this deposit was made with every circumstance which the Courts have thought to be necessary for the purpose. The condition of the bond recites the fact, which is stated before: it is not necessary to describe the condition further than that it was agreed that the sum of 1000*l.* should be secured to be paid to Mr. *Casberd* and Mr. *Lowc*, with interest thereon, by a deposit of the

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title deeds of a certain messuage or tenement belonging to *William Jones*, situate in *Dowry Square*, in the parish of *Clifton* aforesaid, late in the occupation of *Dr. Barry*; and then there follow these words, "and whereas the title deeds to the said houses in *Dowry Square* have been delivered by the said defendant *William Jones* to plaintiffs by way of deposit for securing the said 1000*l.* and interest." So that this recital states an agreement with respect to the deposit, and the object of the deposit; and that the deposit had been made. As I said before, this transaction is not even suspected in point of integrity. Under these facts the plaintiffs call upon the Court, by their bill, for a declaration that they are entitled to be paid the 1000*l.* and interest out of the produce of these premises, by *Mr. Ward* the purchaser, in preference to the claim of the Crown; they also call upon the Court for the directions consequent upon such declaration. These are the substantial objects of the bill. The *Attorney-General*, on the part of the Crown, resists this application, and maintains that the plaintiffs have no right to assistance from a court of equity.

The first question that arises is, whether the plaintiffs have, as they insist, under the circumstances which I have stated, an equitable mortgage or incumbrance? The second is, whether if they have such equitable mortgage, they can make it available against the Crown?

The *Solicitor General* argued that supposing this were a question between subject and subject, the plaintiff had no right even as against a subject; and that the deposit of the deeds gave them only a right perhaps to detain those deeds, but certainly not an equitable mortgage or incumbrance. In answer to this proposition, I can only refer to the cases cited on the other side, and to a great many others which are very clear, and which the counsel for the plaintiffs, I am sure, abstained from citing, because they did not wish to trespass upon the time of the

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Court more than was absolutely necessary. The case which has been most alluded to, and which in truth has been a subject of considerable animadversion, if I may so say, and yet has always been followed, is the case of *Russel v. Russel* (a), which was decided by the Lords Commissioners of the Great Seal, when Lord *Loughborough* was at the head of the commission: but it will be recollected that all the difficulty in that case arose from the circumstance of its being a deposit, with nothing to explain the object of it but parol evidence, and then it was said, and as it appears to me with great force, that parol evidence was prevented from operating by the Statute of Frauds. However, Lord *Loughborough* was of opinion, that if the evidence was such as was stated to him by parol, it would constitute an equitable mortgage, (or an equitable incumbrance; which will answer the purpose here just as well,) and in order to be assured that the evidence was correct, he sent it to an issue: but deciding the principle, that if there be a deposit of deeds, and it is proved by parol that the deposit was for the purpose of securing money, it operates as an equitable mortgage or incumbrance. That case has been followed by other cases under the same circumstances. And in the case of *Wilkinson v. Norris* (b), which I remember personally, for I was in it, although Sir *William Grant* decided that he would not carry the case further than *Russel v. Russel*, he did not go to the extent of saying that it was not correct. The only objection he had to that case rested upon its being parol, not to the deposit of deeds being an equitable mortgage, provided it is sufficiently explained within the Statute of Frauds:—but his objection was, that there was no writing to bring it within the Statute of Frauds; and he complained that the party had not done that which he might have done in two lines of writing. All the other cases which have been cited, in which there

(a) 1 Bro. C. C. 269.

(b) 12 Vez. 192.

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was any evidence in writing sufficient to prove the intention of the parties, have been considered not with reference to *Russel v. Russel*, but with reference to the law of *England* in creating an equitable mortgage or incumbrance; and I would venture to ask any gentleman who has been attending the Court of Chancery, whether they can remember any one week in the course of hearing bankrupt petitions, in which the Lord Chancellor has not directed an estate to be sold to pay off a mortgage or incumbrance created in this manner.

The Court may sometimes doubt whether the evidence produced is sufficient to constitute it a deposit: but the instant there is anything to shew it is a deposit there is an end of all difficulty. The *Solicitor General* urged strongly that this was only a deposit of the deeds. "You may have the deeds, he said, and make the most of them: but they give you no interest in the estate." But I say, the deposit does give an interest in the estate beyond all doubt. There is a very strong case decided by Lord *Thurlow* of *Lucas v. Comerford*, (c) which shews beyond all doubt, that this is an equitable mortgage, just as complete an equitable mortgage as if a conveyance had been made. It was a bill brought by executors of a lessor against the depositary of a lease to secure a debt from the lessee, for a specific performance of a covenant in the lease to rebuild houses upon the premises at a particular time. The defendant admitted he was bound to perform the other covenants in the lease: but insisted he was not bound to rebuild. The Lord Chancellor said, "It is no matter whether defendant took it as a pledge or as a purchase. He cannot take the estate, and refuse the burthen." If he had taken it as a purchaser, he would be liable to all the incumbrances: it does not signify whether he took it as a security for the payment of money, or as a purchaser out and out. The Lord Chancellor says, al-

(c) 1 Ves. J. 235.

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luding to the case of the City of *London v. Nash*, (d) "I rather think, upon reading the answer, that they would recover even without the assignment: but it is very just that they should assign absolutely, and that the defendant should take it, and this will come under the general prayer for relief." So that there the lessor compelled the depositary of the lessee to accept a lease from him, that he might maintain an action on the covenant. Now when I refer to that case, I think it is impossible to hesitate a moment to declare that according to decisions in the Court of Chancery, this is not only an equitable incumbrance, but an equitable mortgage; and that the Court would compel a person who took this deposit as a security, or as evidence of a purchase, to accept an absolute assignment if it were necessary. Here the plaintiffs having taken the deeds as a deposit, and beyond all question, as it appears from the recital in the bond, as a security for the money, I conceive it to be just as much a mortgage in them in equity as if Mr. *Jones* had conveyed to them the whole interest he might have had in the estate for the security of their money, although that interest might have been only the equity of redemption.

Then the question arises, Does such a deposit affect the Crown?

A good deal of difficulty has, I know, occurred in the consideration of cases between the subject and the Crown, from a doctrine which is very well founded, that there are no equities against the Crown; it is very well founded I mean to a certain extent. I felt early in this cause the embarrassment that arose from that doctrine: the Crown, generally speaking, cannot be considered as a trustee; I say generally speaking, because I do not mean to say that it is so universally. I do not know if the Crown had possessed the legal estate here, how I could

(d) 3 Atk. 512.

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have dealt with it, and kept the equitable estate separate from it for the benefit of the *cestui que trust*: but here it is not so; here the Crown has no estate at all—the estate has never passed—it is only seized into the hands of the Crown. Before the statute ordered a sale, the Crown was to retain the estate *quousque*, but not beyond. The only right which passed to the Crown was that of receiving the rents; the legal estate was never in the Crown, therefore the plaintiffs do not call upon me to declare that the Crown is a trustee, because the Crown has not the legal estate,—if it had the legal estate, as I said before, I do not know exactly how I should have been able to deal with it, whatever the justice of the case might require: but the estate is *in medio*,—it is between the parties,—the Crown has no estate,—this Court has sold the estate by force of act of parliament; and the question is between those who are entitled to the money. Now if you allow that the plaintiffs are mortgagees, of course they are entitled to be paid before the Crown, if their title is anterior for you take nothing from the Crown, you only take it from the fund which is the subject of their security; and it really is a question not between *cestui que trust* and trustee, but between two parties, one of whom has a clear title before the other, unless the prerogative of the other prevents his using it. Now the instant it is admitted that a conveyance of an equity of redemption would have been available, I say that an equitable mortgage is just as good, for both of them are interests only in equity; and I am very much fortified in this by what passed in a case of *Boyd v. Benfield*. In that case there were three mortgages of the equity of redemption, I do not know to what extent, one within another: but it never occurred to any one to entertain the least doubt that the Crown was postponed to those who had *bond fide* equitable interests prior in point of date; and though the point was not raised in that case, I can hardly conceive

it could have passed *sub silentio*, if those sitting in this Court, as well as those who had to maintain the interest of the Crown, had thought that the Crown could supersede those who had prior interests against it while the estate was *in medio* between them. It is a necessary consequence, if conveyances of equitable estates are entitled to stand, that the person entitled to an equitable mortgage be in the same situation, for they merely differ in form, and not in substance.

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Cases were cited which I have had the good fortune to be furnished with, in order to shew that the Crown is not affected by a security of this kind. The first was the case of *The King v. Charles Snow* in *Trinity* term 1794: I have a note of it, which I believe is correct. On the 2d of *March*, 1793, the defendant agreed in writing to sell four leasehold messuages to *Samuel Collins* for 700*l.*; *Collins* immediately paid 400*l.* in part, and agreed to pay the remaining 300*l.* within a month after that time. On payment of the remainder *Snow* was to assign the premises to *Collins*. Observe, this is an agreement by *Snow*, the King's debtor, to sell to *Collins* an estate, a leasehold estate for 700*l.* *Collins* became entitled to the estate in equity, and paid 400*l.* in part of the purchase money, and promised to pay the remaining 300*l.* within a month afterwards. *Snow* absconded within the month, and *Collins* therefore did not pay the 300*l.* On the 22d of *March*, 1793, an extent issued against *Snow*, and on the 15th of the following *May* an inquisition was taken, and it was found that *Snow* was possessed of and entitled unto a certain piece or parcel of ground, and to seventeen messuages, &c. for the remainder of a term of forty years, under the Dean and Chapter of *Westminster*, and which piece of ground, and messuages, &c. were by the said *Charles Snow*, before the said 22d day of *March*, mortgaged to certain persons for securing the payment of 2190*l.* and interest. On the 26th of *February* 1794, there

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was an order to sell these premises, and *Collins* gave the sheriff notice to pay him the 400*l.* which he had paid to *Snow*. On the same day the sheriff sold the premises to the highest bidder. On the 31st of *May*, 1794, *Collins* obtained a rule to shew cause why he should not be paid back out of the purchase money the 400*l.* he had paid to *Snow*. On the 4th of *July*, 1794, the *Attorney-General* shewing cause against the rule, and the rule was discharged; on what ground the rule was argued or was discharged does not appear: but let us consider the case. In the first place it was an equity; but observe what it was. *Collins* by an agreement in writing became equitable owner of the leasehold premises; he agreed to buy them, and he was entitled on payment of the rest of the purchase money to have an assignment: but that was as owner of the equity, he had paid part of his purchase money, and he might right or wrong have called upon the crown to let him have the premises upon payment of 300*l.* more; but that was his only equity, as it appears to me by his application to the Court. But he did not seek to enforce that equity. He demanded payment of the money he had paid to *Snow*, and which *Snow* had a right to keep. If I buy an estate of A. and pay the money, A. has a right to keep the money; if he will not give me the estate I have no right to the money back again; but to the estate. However, if this could be considered as an equity, it was an equity only, and the relief could be given only in a court of equity. But it seems to me that as Mr. *Snow* had agreed to convey the estate to *Collins*, and he had paid part of the purchase money, *Collins* was equitable owner of the estate, but had no right to be repaid his 400*l.* The other case is the *King v. Benson*, which happened in the year 1804. By an inquisition on one of the extents issued against *Benson*, the jury found that he was seised of a freehold messuage, &c. and that he had been possessed of the title deeds which were the subject of the proceedings; that *Benson* had placed those title deeds in the

hands of *James Hall* as attorney for Messrs. *Tomkins* and Co., to enable him to prepare a security for a debt then due from *Benson* to *Tomkins* and Co., and for all further sums of money that might in future become due from him to them, and for any bills they might accept for him, and that the deeds remained to the taking of the inquisition in the hands and possession of *Hall* for the purpose aforesaid: but *Benson* had not executed any security. You observe the finding of the jury is, that the deeds were deposited by *Benson* in the hands of *Hall* as attorney for *Tomkins* and Co., to enable *Hall* to prepare the security for that debt, and for other debts. Now if that was the case, it was not, according to the case of *Norris v. Wilkinson*, (c) an equitable mortgage. *Tomkins* and Co. however appeared and claimed the messuage or tenement in the inquisition named, and they pleaded that before the issuing of the extent *Benson* was well entitled as owner, and seised in his demesne as of fee, of and in the messuage, &c. and was also possessed of divers deeds, writings or specialties relating thereto, and being the title to the same, and being so respectively seised and possessed thereof, he became and was indebted to the claimants in a large sum of money, and that *Benson* being so indebted, he in consideration thereof and before he became indebted to the crown, promised and consented to mortgage the said messuage and tenement with the appurtenances, for securing amongst other things the repayment of the money so due to them, and delivered to the claimants the several deeds, writings, and specialties relating thereto, and being his title to the same then in his power or possession, as a security or pledge for the repayment of the money, and for the title of the said *William Benson* to the said messuage, and that such mortgage or security might be made: so that they mingled in their plea these things: viz. that before he became indebted to the crown, he

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promised to mortgage the premises to *Tomkins* and Co. to secure the money due to them, and delivered to them the title deeds as a security or pledge for the repayment of the money;”—that is, stating it in the way of an equitable mortgage, “and that such mortgage, or security, might be made; so that, here they depart from the ground of their having put these as a deposit or pledge: but they say that it was done in order that a mortgage might be made, which mortgage he had promised to make; “whereupon *Tomkins* and Co. became and continued legally possessed of the several deeds and writings of the title to the said estate for the purpose of preparing such mortgage or security as aforesaid;” then follows an averment, “that *Tomkins* became and continued legally possessed of the several title deeds and writings, the title to the said estate, for the purpose of preparing such mortgage or security as aforesaid, and entitled to have the same made as aforesaid, and to have and enjoy the said messuage or tenement under the same;” so that, in truth, this plea does not state an equitable mortgage; for if you look at their plea, it is impossible to say that they mean more than this, that the deeds were deposited with *Hall*, in order to enable him to prepare that which *Benson* had promised to make. It seems that no proceedings were had for some time: but in *December* 1804, a motion was made on behalf of the Crown for an order to sell the estates of *Benson*, of which the premises in question were part. *Tomkins* opposed this motion as to these premises. The judgment upon this part of the case is as follows: “and as to the rest of the estates of the said *William Benson*, seized into his Majesty’s hands under and by virtue of the said writ of extent, it appearing to the Court that the title deeds which relate to the said estates are in the custody of *Benjamin Tomkins*, *John Coles*, and *John Maudt*, creditors of the said *William Benson*, and who claim an equitable lien thereon, for or on account of their debt due from the said *William*

Benson; the Court do not make any order for the sale of those estates;" so that even upon this statement the Court seem to have hesitated. Then, in *Hilary Term 1806*, the *Attorney-General* filed an information of trover against *Tomkins* and Co., on account of the detention of the title deeds, to which they pleaded the general issue, and upon the trial thereof *Tomkins* and Co. having proved the *bond fide* deposit of the deeds in their hands, or the hands of their solicitor, for securing such balance, a verdict, with nominal damages only, was entered in favour of the Crown, and *Tomkins* and Co. moved for a rule to shew cause why that verdict should not be set aside, and a verdict entered for themselves. It appears from these proceedings that this rule was afterwards discharged by consent, on the *Attorney-General* undertaking that no advantage should be taken of the verdict entered for the Crown, and that they should be at liberty to retain the deeds. *Tomkins* and Co. being advised that the question might be discussed and decided by traversing the inquisition, pleaded to the effect I have before stated, and the question came before the Court on a demurrer by the *Attorney-General*; and on argument a judgment was given in favour of the Crown. It is said, however, to have been declared by the Court that they gave judgment for the Crown, because *Tomkins* had no legal, but only an equitable, right; and that the Court was bound to decide according to the legal right: and it appears to be a reasonable ground for the decision, for if it was any thing it was an equitable incumbrance, and could not be maintained at law. Then a bill in Chancery was filed by *Tomkins* against the *Attorney-General* and *Benson*, stating these several facts; and *Tomkins* and Co. insisted upon their equitable rights. The *Attorney-General* put in the usual *Attorney-General's* answer, and *Benson* denied all the facts stated by the bill as forming the ground of the equitable mortgage; and, therefore, that being read in a Court of Equity, of course

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they could not grant an injunction on bill, and answer the facts, being denied by the answer. It is stated that *Benson* was afterwards indicted for perjury; he was acquitted upon that indictment, and what became of it afterwards does not appear: but there is no decision at all affecting this case, and beyond all question there is nothing like a decision anywhere, having that effect.

These cases, therefore, as it appears to me, leave the case as if they had not happened; if they prove any thing, they incline to the proving that an equitable mortgage would have succeeded to a considerable extent; but beyond that they cannot be considered as applying at all. Upon these cases, however, I do not rely at all, and therefore I must have recourse to the case as it stands by itself.

Now seeing that these two cases, which were the only cases produced, do not, in my apprehension, affect this question, or the grounds upon which I feel myself obliged to consider this case, we are brought to the last question, whether taking it for granted that this is an equitable mortgage, and that equitable mortgages are good against the Crown in general, it is valid against the Crown in the case at bar. It is quite clear that *Mr. Jones* was, before this deposit was made, liable to the process of the Crown in respect of the money which he received as collector of the taxes, and which was in his hands: but it does not follow that he is therefore that kind of debtor to the Crown, which would affect an equitable or a legal interest. If he was a debtor to the Crown by record, or one of the persons described in the 13th of *Elix.*, there is no doubt that whether it is an equitable or a legal mortgage, it would not have affected the Crown, for the right of the Crown would have accrued the moment he was a debtor on record, or under the statute of *Elizabeth*; but if he was not a debtor on record, as he clearly was not, for he gave no bond to the Crown; and if he was not within

the statute of *Elizabeth*, which is the only question remaining, then he was only a simple contract debtor; and the Crown had no right to the estate until he became a debtor by record, which he did not become until the inquisition was taken, and that was a considerable time after the deposit was made.

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There was certainly a very considerable doubt in *Westminster Hall* before the case of the *Attorney-General v. Smith, (f)* whether the Crown's debtor by simple contract and those who made purchase of estates from him were not in the situation of a debtor by record; and any body who will look through that case must see that a great deal of industry has been used by the Court to shew that the doubt entertained arose from a mistake. That case of the *Attorney-General v. Smith* has not been doubted upon the present occasion; it has been acknowledged to be consistent with the law. It will not be necessary for me to do more than to say, that I feel myself bound to follow a decision which I see made upon grave and proper consideration: but I have no difficulty in saying, that having examined the question not only now, but formerly, with a view to this particular subject, I have no doubt upon earth it is the only decision that ought to have been made under the circumstances of that case; and, therefore, if Mr. *Jones* be not a debtor to the Crown by record, nor under the statute of Queen *Elizabeth*, then I take it he is to be considered as a mere simple contract debtor. Now I have looked frequently into the statute of Queen *Elizabeth*, and I cannot myself entertain any doubt that he is not at all within that statute. I do not see one word in that statute which applies to the case of Mr. *Jones*; he was not appointed by the Crown; he was not a servant of the Crown; he was appointed by other persons, he gave no secu-

(f) Sugden's Vendors and Purchasers. Appendix 24. No. xvi. Ed. 1818.

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rity to the Crown, the security he gave was to other persons. Although beyond all doubt he was liable to pay to the Crown; he was subject to the process of the Crown, as every one is who has money of the Crown in his hands *quidcumque vid*, yet there is nothing in his case which can bring him within the meaning of the statute alluded to:

The statute of 14 *Elizabeth* throws a great light on the construction to be put on the 13th of *Elizabeth*; for that act goes to shew that a person not immediately a debtor to the Crown in the way pointed out by the statute of 13 *Elizabeth* might become so by specialty; it names a person who was not in that condition: so that if an act of parliament was made for the purpose of introducing a person who is not immediately to be considered as a debtor by record to the Crown, it is evident that the other act of the 13th of *Elizabeth* did not mean to include any but those who were immediately debtors to the Crown. If the statute of 13 *Elizabeth* were sufficient to reach a person made liable by 14th of *Elizabeth*, it must be considered applicable to the present case: but if it was not considered in 14 *Elizabeth* that the person there made liable, was liable under 13 *Elizabeth*, then it is quite clear that no person in that situation could be liable.

Under these circumstances, it appears to me that the plaintiffs are entitled to the relief which they pray. Mr. *Ward* having agreed to buy the estate, I must declare that the plaintiffs are entitled to be considered as equitable mortgagees on this property to the extent of 1000*l.* and interest; and it must be referred to the Master to take an account of the 1000*l.* and interest, and it must be decreed that Mr. *Ward* perform his purchase specifically; that he pay out of his purchase money what shall appear to be due of the 1000*l.* and interest to the

present plaintiffs, and that the residue be paid to the Crown. The plaintiffs are to receive principal, interest, and costs of course.

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Mr. Jervis. It is also a part of the prayer, that if the amount of the purchase money is not sufficient, the plaintiffs may have an account of the rents received in the mean time.

LORD CHIEF BARON,

You are entitled to be paid in any way, you must have an account of the rents and profits received by the crown, if the purchase money is not sufficient to pay the principal, interest, and costs.

The Court doth declare that the plaintiffs are entitled under and by virtue of the bond and declaration in the pleadings mentioned, and the deposit of the title deeds accompanying the same, to be and to be considered as equitable mortgagees of the house and premises in Dawry Square, in the pleadings mentioned for securing them, the payment of 1000*l.* and interest due thereon, in preference and priority to the right of the King's Majesty, or of his Majesty's Attorney-General, under and by virtue of the writ of extent issued against the defendant *William Jones*, in the pleadings also mentioned; and it is ordered,

adjudged, and decreed, that it be and it is hereby referred to *Abel Moysey*, Esq. the Deputy to his Majesty's Remembrancer of this Court, to take an account of what is due to the said plaintiffs for principal and interest on their said security, and to tax them their costs of this suit, and otherwise increased in relation to the said security; and the Court doth declare that the said plaintiffs are entitled to be paid what shall be found due to them for principal, interest, and costs as aforesaid, out of the purchase money arising by the sale of the said estate and premises purchased by the defendant *Danvers Ward*, under an order

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of this Court, bearing date the 5th day of May, 1815, made in a cause, "*The King v. Wm. Jones,*" and doth decree the same accordingly; and the Court doth also declare the defendant *Richard Brickdale Ward*, the trustee of the term of 1000 years in the hereditaments in the pleadings mentioned, is and is to be considered a trustee of the said term for the plaintiffs, for the better securing to them what shall be found due on their said security. And it is further ordered, adjudged and decreed by the Court, that when and so soon as the said defendant *Danvers Ward* shall have completed his said purchase, and paid his purchase money into Court in trust, in the said cause "*The King v. W. Jones,*" that the said Deputy Remembrancer do pay thereout to the said plaintiffs what shall be found due to them for the principal interest and costs upon the account hereinbefore directed, and pay the remainder of the said purchase money (if any) to the use of His Majesty, and upon payment to the plaintiffs of what shall be found due to them for principal, interest

and costs as aforesaid, the plaintiffs and the said defendant *Richard Brickdale Ward*, and all proper parties, are to join in and execute proper conveyances to the said defendant *Danvers Ward*, which are to be settled by the said Deputy Remembrancer, in case the parties differ about the same; and thereupon it is ordered by the Court, that the said plaintiffs do deliver up all title deeds and writings in their custody to the said defendant *Danvers Ward*, but in case the purchase money for the said hereditaments when paid into Court shall be insufficient for payment of what shall be found due to the plaintiffs upon their said security for principal interest and costs as aforesaid, it is ordered and decreed by the Court that it be and it is hereby referred to the said Deputy Remembrancer to inquire and report to the Court who has received the rents and profits of the said estate, since the same was seized into the hands of His Majesty under the said writ of extent, and by what authority, and to what amount, and what has become thereof, &c.

1819.

KIRKBANK v. HUDSON.

April 21.

May 10.

RICHARD DICKENSON, by his will dated the 5th of *July*, 1816, after giving certain specific and pecuniary legacies, and appointing *Thomas Hudson* and *Samuel Hudson*, clerk, his executors in trust thereof, expressed himself in the following words, *viz.* "I do hereby give and devise unto them the said *Thomas Hudson* and *Samuel Hudson*, their heirs and assigns, in trust, all such freehold and other messuages, lands, tenements, and hereditaments, as are vested in me by way of mortgage, to the intent that they may be enabled to reconvey the same, and do every necessary act concerning such mortgages respectively, without making any application to my heir or heirs at law; and after the payment of my just debts, funeral and testamentary expenses and legacies, and the costs and charges attending the execution or performance of the trusts of this my will, I give and bequeath all the rest of my monies, goods, effects, and personal estate whatsoever, to be a perpetual endowment or maintenance for two schools, one in the parish of *Lamplugh*, and the other in the parish of *Castlecarrock*, both in the county of *Cumberland*; and I appoint the said *Thomas Hudson* and *Samuel Hudson*, and the survivor of them, and the rectors for the time being of the said parishes of *Lamplugh* and *Castlecarrock*, and their successors for ever, patrons of these two schools, with full power to present a schoolmaster to each of them whenever a vacancy may happen: and I will and direct that each of the said schoolmasters shall teach ten poor scholars in each of the said parishes without any gratuity, fee, or reward, otherwise they shall not be entitled to receive their annual stipend, which said poor scholars shall be chosen by the principal inhabitants of

A testator gives the residue of his personal estate for the maintenance and endowment of two schools, &c. and recommends that at a convenient time his money shall be collected and laid out in the purchase of a freehold messuage, &c. to be a perpetual endowment for the support of the school. Held that the bequest is void under 9 Geo. 2. c. 36.

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each parish ; and I do order and direct that my revenue and income, or the annual proceeds or interest of the net residue of my personal estate, shall be divided equally between the two schoolmasters, share and share alike ; I give my library or collection of books to these two schools for the use of the schoolmasters, to be divided equally at the discretion of my executors ; and I desire that my books may not be lent or lost, or abused, but kept in good repair and in regular order with a catalogue constantly at each place. I give the two bookcases in which the said books are deposited, one to each of the said schools ; and *I recommend*, that at a convenient time my money shall be collected together and laid out in the purchase of a freehold messuage and tenement, or lands which are freehold, to be a perpetual endowment for the said two schools, by an equal portion to each of the schoolmasters in every year after all incidental expenses are paid, provided and my will is, that my estate and effects so vested in trust shall be suffered to accumulate until the annual proceeds shall amount to 100*l. per annum* for each schoolmaster, and then the net annual proceeds shall be applied in the endowment of the said two schools as aforesaid ; and when the trust reposed in my two friends *Thomas Hudson* and *Samuel Hudson*, through length of time, or mortality, or any other cause, may cease, my said estate and effects shall vest in, and the like trust shall descend or devolve upon the rector of *Lamplugh*, and the rector of *Castlecarrack*, and their successors for the time being, for ever, as trustees, or agents, or patrons for the said two schools ; and I give and bequeath all my property as aforesaid, in trust, to my said executors for the uses before expressed."

After the death of the testator his will was proved by his executors, and the present suit was instituted by his next of kin against his Majesty's *Attorney-General*, for

the purpose of having the above bequest of the residue of his personal estate declared void under the 9 *Geo. 2. c. 36.*

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Mr. *Jervis* and Mr. *Harrison* for the plaintiffs.

Mr. *Raithby* for the *Attorney-General*.

Mr. *Martin* and Mr. *Lynch* for the other defendants.

LORD CHIEF BARON.

May 10.

This is a bill by the next of kin of the testator, *William Dickenson*, for an account of his personal estate, he having given part of it to a charity.

That which was out upon mortgage clearly belongs to the next of kin, as, according to the statute, it could not pass. The only question is, whether the bequest of the rest is not also void ?

The residue of the personal estate is directly given to be laid out in land ; and if the will had stopped at that direction, there could have been no doubt on the subject : but it is said that there is a discretion in the trustees, either to lay the money out in land, or to leave it as personalty.

The testator gives all the residue of his money, goods, effects, and personal estate whatsoever, to be a perpetual endowment or maintenance for the two schools in question, and appoints certain persons to be patrons of the schools, and then gives directions respecting the appointment of schoolmasters, and their duties. So far there is no doubt but that the bequest to the school is valid : but then he goes on to say, “ I recommend that at a convenient time my money shall be collected together and laid

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out in the purchase of a freehold messuage and tenement, or lands which are freehold, to be a perpetual endowment for the said two schools, &c." and the question arises, whether these words are mandatory? for if they are the whole bequest is void.

The cases of *Sorresby v. Hollins*, (a) and *Grimmett v. Grimmett*, (b) afford the foundation of all the arguments which have been used in favour of the charity: but it is to be recollected, that in those days there was a greater inclination in the Courts to support charitable bequests than there is at present. This inclination was first broken in upon by Lord Northington in *Attorney-General v. Tyndall*. (c)

In *Sorresby v. Hollins*, the testator directed his executors to settle and secure by purchase of lands of inheritance, or otherwise, as they should be advised out of his personal estate, an annuity of 50*l.* to be paid yearly and distributed in the manner which he directed. Notwithstanding the deference I entertain for the opinion of Lord Hardwicke, I must say that I should have conceived these words to have been imperative, but he has decided they were not so; and in *Grimmett v. Grimmett* he lays down the law thus: "It was said, the rule of construction as to the devise of money to be laid out in lands is the same now as it was before the statute of mortmain. That is true. But suppose the trustees in this case would not act, the trust would devolve on the Court, and I would order the money to be placed in the funds and not invested in lands. Sir Joseph Jekyll always did so before the statute." From this it appears, that where the words of the will left it to the option of the trustees whether they would lay the money out in land, or conti-

(a) 9 Mod. 221. cited Amb.
211.

(b) Amb. 210.

(c) Amb. 615.

nue it as personalty, the Court before the statute would have exercised the trust by continuing it as personalty; and that after the statute the Court would not depart from that rule: This brings the question here to whether there is any option given to the trustees.

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Several cases have been decided upon points of this description, *Grievos v. Case*, (d) *Blandford v. Faeherell*, (e) *English v. Ord*. (f)

And they all turn upon the circumstance of the recommendation to the trustees being mandatory.

It appears to me, that in this case the words of the will are imperative upon the trustees. In *Pierson v. Garnett*, (g) Lord *Kenyon* held that the words *dying request* were mandatory, and he refers to *Hartland v. Trigg*, (h) and *Wynne v. Hawkins*; (i) and he treats the word *recommend* as having the same effect. In *Malim v. Keighley*, (k) Lord *Alvanley* says, "the question is whether there is any difference between '*recommend*,' and '*it is my dying request*.'" Whether the former is not equal to the latter. If I was deciding upon the right of the words, I rather think "*recommend*" is stronger than "*desire*."

The words in this case are, "*I recommend that at a convenient time, &c.*" that means, I direct that at a proper opportunity "my money shall be collected and laid out in the purchase of a freehold messuage, &c." Suppose he had given a sum of money to be laid out in land for the benefit of A., and that A. had died before it was

(d) 1 Vez. J. 548.

(h) 1 Bro. C.C. 141.

(e) 4 Bro. C.C. 394.

(i) Ibid. 179.

(f) Highmore on Mortm.

(k) 2 Vez. J. 335. and 529.

181.

S. C.

(g) 2 Bro. C.C. 38.

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laid out, and this had been a bill filed by the heir at law, —can any one doubt but that as between the heir at law and the personal representative, it would go to the heir? Can the circumstance then of this being a gift for a charity make any difference? The object for which the bequest was intended cannot have any effect.

Under these circumstances, I am of opinion that the words in question have rendered the whole bequest void under the statute, and that the plaintiffs, as next of kin, are entitled to the testator's residuary personal estate.

Decree for plaintiffs.

April 21, 22.
May 10.

BOWMAKER v. MOORE.

The obligee and principal in a *replevin bond* without the knowledge of the surety enter into an agreement for a reference of all matters in dispute between them to arbitration, and afterwards the principal gives a *cognovit* acknowledging the obligee's right to distrain for

THE bill was filed by one of the sureties in a replevin bond, to be discharged from his liability, and for an injunction under the following circumstances.

On the 19th of *June*, 1814, *Peter Patrick Shireff* being in the occupation of a farm called *Portlington Hall*, in the county of *Suffolk*, as tenant to the defendant *Richard Moore*, at the yearly rent of 1695*l.* under an agreement for a lease, and having been distrained upon by *Moore* for a year's rent then due, replevied and applied to the plaintiff to become one of his sureties in the replevin bond, to which the plaintiff consented, and accordingly executed a replevin bond, dated the 23d of *March*, 1814, the sum awarded, and authorizing judgment of *non pros* to be entered up in the ensuing term, which was a term later than that in which, according to the usual course, judgment might have been signed. Held that the surety was discharged from his obligation.

in the ordinary form, whereby he, together with *Shireff* and one *Trelfs*, who was a co-surety, became bound to the chief steward of the liberty in the penal sum of 4000*l.* with the usual condition for making the same void, if *Shireff* should appear at the next court to be holden for the liberty, and prosecute his replevin with effect, and make return of the goods if adjudged.

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At the time of the plaintiff executing the bond in question various disputes had taken place between *Moore* and *Shireff* respecting the terms upon which the farm was held, and another action of replevin was actually depending between them touching a previous distress which had been levied by *Moore* for the rent which became due in the year 1813. Of the existence of this action the plaintiff had no information at the time of his becoming surety.

Shortly after the plaintiff had executed the replevin bond, the first replevin being ready for trial at the assizes, *Moore* and *Shireff* agreed to refer the matters in dispute between them to arbitration; and as part of the arrangement entered into on that occasion, *Shireff* confessed judgment to *Moore* in the action of replevin pending between them in respect of the rent due in 1813, by way of security for the amount of what should be awarded to be due from him by the arbitrators.

By the articles of agreement which were signed on this occasion, it was agreed that the award should be made on or before the 23rd of *May*, 1814, but might be extended to the 24th of *June* at the discretion of the arbitrators. That *Shireff* should be at liberty to deduct all monies which should be awarded due to him in respect of his claims, &c. out of the arrear of rent then due or thereafter to become due from him, and the arbitrators were to appoint a day for the payment of such rent or the

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balance thereof, and it was stipulated that "nothing therein contained should extend or be deemed or construed to extend so as to prejudice the distress made by *Moore* on the 19th of *June*, 1814, for rent arrear, or to discharge the sureties of *Shireff* in the replevying of such distress, but that pending the reference no proceedings should be taken upon such distress."

The above agreement was not communicated to the plaintiff. The parties however proceeded with the reference; and the arbitrators not having made their award within the period limited by the agreement, the time was enlarged by *Shireff* and *Moore* to the 7th of *July*, 1814, when the award was made, and thereby after awarding certain deductions to be made in favour of *Shireff*, the arbitrators appointed the 8th of *August* next ensuing for payment of the balance due from *Shireff* for his rent or arrear of rent under the agreement of the 30th of *July*, 1810.

Notwithstanding the agreement which had been entered into, and the pendency of the reference, the defendant *Moore* on the 24th of *April*, 1814, removed the plaint in the action of replevin, in which plaintiff had become surety from the Court of the steward of the liberty in which it had been commenced to the Court of Common Pleas by an *accedas ad curiam*, and on the 15th of *May* following served *Shireff* with a rule to declare in the action, whereby according to the course of proceeding in such cases he became entitled to sign judgment of *non pros* for want of a declaration on the 30th of the same month, and immediately thereon to sue out a writ *de retorno habendo*. *Shireff* however did not proceed with the replevin: but on the 22nd of *August* gave a *cognovit* in favour of *Moore*. The *cognovit* so given was to the following effect: "I confess the defendant's title to distrain for the sum of 1691*l.* 7*s.* 6*d.* and hereby agree that

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I will not declare or take any other proceedings herein, but that the abovenamed defendant shall and may in case default shall be made in payment of the said sum of 1691*l.* 7*s.* 6*d.* on the first day of Michaelmas term next ensuing sign *non pros* in this action. Neither the money directed by the award, nor the 1691*l.* 7*s.* 6*d.* mentioned in the *cognovit*, was paid by *Shireff* at the time appointed; in consequence of which *Moore* on the first day of Michaelmas term entered up judgment in the action of replevin against *Shireff*, and sued out a writ *de retorno habendo* directed to the high steward of the liberty to which an eloignment was returned. Whereupon *Moore* procured an assignment from the high steward of the bail bond entered into by the said plaintiff, and commenced an action upon it in the Court of Common Pleas. The plaintiff in Michaelmas Term, 1815, obtained a rule *nisi* in that Court to set aside the proceedings in this action, on the ground that *Moore* had by the reference given him to *Shireff*, and discharged the surety in the replevin bond. The Court however, upon hearing the case argued, discharged the rule. (a) The plaintiff then pleaded the above mentioned facts in bar to the action to which the defendant demurred, and the Court allowed the demurrer. (b)

Having failed in his defence at law, the plaintiff instituted the present suit to restrain further proceedings on the bail bond, and to have it delivered up on the ground that *Moore* by entering into the agreement for a reference had virtually discharged the plaintiff from his suretyship. On the 22d of November, 1816, the plaintiff moved for and obtained an injunction till the hearing, upon the merits of the case as confessed in the answer of the defendant *Moore*, (c) and the cause now came on to be heard before the Lord Chief Baron.

(a) *Moore v. Bowmaker*, 6 Taunt. 379. 2 Marshall 82. S. C.

(b) *Moore v. Bowmaker*, 2 Marshall 392. (c) 3 Price 214.

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v.
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Mr. *Martin* and Mr. *Timney* for the plaintiff.

Mr. *Roupell* for the defendant.

LORD CHIEF BARON,

In this case there have been already two decisions in the Court of Common Pleas, which were adverse to the plaintiff, and an injunction is now prayed to restrain the defendant from proceeding at law.

The case arises upon a replevin bond which the plaintiff executed as a surety for a person of the name of *Shireff*. The defendant was the landlord of *Shireff*, and distrained upon him for rent; and the question is whether under the circumstances the defendant has not forfeited his right to sue the plaintiff.

On the 13th of *July*, 1810, the defendant agreed to let a farm to *Shireff*, and on the 2d of *February*, 1813, he distrained for rent, which the tenant replevied. The case was removed from the local jurisdiction to the Court of Common Pleas, and was ready for trial at the Spring Assizes for 1814. In the mean time another distress had been taken and replevied, and on that occasion the plaintiff executed the bond in question as one of the sureties for *Shireff*. When the first case came on for trial, an agreement was entered into between the defendant and *Shireff* for a reference of all matters in dispute between them to arbitration, pending which reference no proceeding was to be taken in the second replevin, which however was not to be affected by it. The award was to be made on the 23rd of *May* or 24th of *June*. That was the time agreed between them: but the parties afterwards enlarged the period till the 7th of *July*, at which time the award was made.

Pending the reference, *Moore* in breach of the agree-

ment sued out an *accedas ad curiam*, and after the award was made, that is to say on the 22d of *August*, 1822, *Shireff* signed a *cognovit* upon which judgment was entered upon against him, and a writ *de retorno habendo* issued. In consequence of the sheriff having returned an *eloignment*, an action was brought upon the replevin bond against the plaintiff, and the plaintiff now insists that he is discharged from all liability, because the parties have placed him in a different situation from that in which he ought to have been.

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Several points have been insisted upon in the course of the argument in favour of the plaintiff. The first is that of *fraud*: but no evidence of any fraud has been produced. The next is the *cognovit*; I do not however think that the *cognovit* can be considered as in any degree affecting the plaintiff. It was not part of the original contract between the parties, that the surety should have any control. The only remaining question is, whether the surety has been placed by the conduct of the parties in a different situation from that which he ought to have been in.

The contract between a principal and his surety is, that the principal shall give the surety every advantage he legally can. It is said that one of the objects of the reference was to ascertain the time of the rent becoming due, and that any proceeding to ascertain the time could not prejudice the surety, and that it is to be remembered that the award was to be made on the 24th of *June*, and that if the arbitrators had made their award at that time, the situation of the parties would have been the same: but although no prejudice is actually done to the surety, yet if I do an act which may prejudice him, I do not perform my part of the contract.

The agreement was that no proceedings should be

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taken pending the reference, the consequence was, that if the terms of that agreement had been complied with, neither *Shireff* nor the defendant could have proceeded. Their not proceeding with the action might have been very prejudicial to the plaintiff. It is to be supposed that when he entered into the bond he believed his principal was solvent, and in this view of the case delay might have been extremely prejudicial; it might be very convenient to *Shireff*, but very inconvenient to the plaintiff. I do not think I am permitted to enquire whether any prejudice did actually arise; it is sufficient that what has been done might have produced injury to the party.

It is true the *accedas ad curiam* was sued out notwithstanding the reference; but that was in the breach of the agreement, and must be put out of the question: but even then the parties by enlarging the time till the 7th of *July*, put it totally out of the power of them to proceed till after that time. Trinity Term would then be over, and no proceedings could be had till Michaelmas Term, and no trial would have taken place before the Spring Assizes in the following year.

Under these circumstances it appears to me that a material alteration was made in the situation of the surety by the parties. If an obligee and principal in a bond of this nature for their own convenience put the surety in a different situation from that in which he would have been placed if the usual course of proceeding had been adopted, that will discharge the surety. The injunction must be made perpetual. After the two decisions at law in favour of the defendant, I cannot give costs.

Decree for plaintiff without costs.

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ATTORNEY-GENERAL v. LORD EARDLEY
and Others.

June 22, 23.
28. 1819.
Jan. 17, 1820.

THIS was an information filed by his Majesty's *Attorney-General* against Lord *Eardley* and others, to recover the value of the tithes of corn, hay, osiers, and other titheable matters, had and taken by the defendants from a certain portion of land called the *Borough Fen*, situate within the great level of the fens called the *Bedford Level*.

The information alleged that within the great level of the fens called the *Bedford Level* there were formerly great quantities of low marsh and fenny lands, overflowed and surrounded by water, which in or about the reign of his late Majesty Charles the Second were drained and recovered from the said water, and had become and for many years past had been very good arable, meadow and pasture ground; that the said fens and drained grounds, particularly the lands in question, never did lie and were never taken or reputed to be within the bounds or known limits of any parish, or the titheable places thereof, at any time before the draining thereof, but had always been esteemed to be and were *extraparochial*; and that no tithes or composition for tithes had ever been paid, satisfied or answered to any church or chapel, or to any rector, vicar, curate or lessee of any rectory, vicarage, church or chapel whatsoever, but the Kings and Queens of this realm in right of the crown of England or their lessees ever since the draining of the said lands had been entitled to and had or ought to have received all tithes both great and small arising, &c. in and upon the said fens and grounds as being *extraparochial*.

The King in right of his crown has a general right to the tithes of all lands situate in *extra-parochial* places.

The words *tithes* and *hereditaments* occurring amongst words of general description in a grant, after a particular description of the thing intended to be passed will not pass *tithes in gross*.

A return of "*Nu*" a sufficient putting in charge under the *Nullum Tempus Act*.
9 Geo. 3. c. 16.

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That his present Majesty in right of his crown of *England* was well and lawfully entitled to all and singular such tithes, and that the defendants being occupiers of certain lands within a certain fen or district called *Borough Fen*, in the said great level called the *Bedford Level*, had taken various titheable matters and things grown upon their said lands, without setting out the tithes thereof for his Majesty, or making any composition or satisfaction for the same.

The information also stated that Lord *Eardley* was the owner or proprietor of all the lands in question, but had demised parts thereof to the other defendants as being tithe free, and engaged to pay them the value of any tithes which might be due in respect of the parts so demised to them, and to indemnify them against the payment of any tithes in respect of their lands, and on that account had received a larger rent for such lands than he would otherwise have been able to procure, and had therefore in fact received the value of the tithes which ought to have been paid to the King, and upon this ground the information submitted that his lordship as well as the occupiers of the lands was answerable for the value of such tithes.

All the defendants by their answers admitted the perception of titheable matters, except Lord *Eardley*, who stated that the only land in his occupation within *Borough Fen*, was a decoy which covered about 40 acres of the fen, which had always been under the management of some person, who received one half of the profits of the decoy for his trouble, and submitted that the King in right of his crown was not entitled to any tithes in respect of such decoy.

The lands in question were admitted to be all extra-parochial. But the claim of the crown to the tithes arising upon them was resisted by the defendants on three grounds.

1. Because the crown is not entitled generally to the tithes of extraparochial lands.

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2. Because the tithes in question were expressly granted in the 2d of *William and Mary*, to the Earl of *Torrington*, from whom Lord *Eardley* derived title.

3. Because the right of the crown, if any, was barred by the 9 *Geo. 3. c. 16.* commonly called the *Nullum Tempus Act.*

The *Solicitor-General* for the crown, in the first instance, relied upon the general right of the King to the tithes arising upon all lands in extraparochial places.

The evidence for the defendants consisted, 1st. of the grant to Lord *Torrington* under whom they claimed, which was made by letters patent under the Great Seal, dated the 14th of *May*, in the 2d of *William and Mary*, 1690, whereby in consideration of the good and faithful service of Arthur, Earl of *Torrington*, and for the better support of the honour and dignity they had conferred upon him, the King and Queen of their *certain knowledge, mere motion, and special favour*, granted to him and his heirs all those parcels of ground (therein particularly described) containing 10,000 acres more or less lying in the great level of the fen called *Peterborough or Bedford Level*, extending into the counties of *Northampton, Lincoln, Huntingdon, Cambridge*, and the Isle of *Ely*, which by letters patent of King Charles the Second; dated 14th of *Dec.* 1661, were granted to the late King James the Second, then Duke of York and his heirs, and afterwards by letters patent of the said King James the Second, dated 28th of *August*, 1685, were granted (*int. al.*) to *Lawrence Earl of Rochester, Henry Earl of Peterborough, Sidney Lord Godolphin, Robert Werden, Esq. and Sir*

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*Edward Herbert, Knt. and their heirs, for the life of the late Queen Mary, consort to the said late King James the Second, in trust for the said late Queen, and all other lands and hereditaments, parcel of the 10,000 acres in Peterborough Level or Bedford Level aforesaid, or which by the said recited letters patent, of King Charles the Second, were granted to the said King James the Second, when Duke of York, and his heirs, (all which premises are therein mentioned to be of the clear yearly value of 3000*l.* beyond all charges, reprises and deductions whatsoever,) and all messuages, mills, houses, edifices, structures, barns, stables, dovehouses, sheds and buildings whatsoever, in or upon the premises, or any of them theretofore erected and built, and all gardens, orchards, tofts, crofts, cottages, lands, tenements, meadows, pastures, feedings, commons, demesne lands, wastes, tithes, oblations, obventions, waters, watercourses, pools, dams, rivers, streams, fishings, mines, quarries, rents, reversions and services, estovers, common of estovers, tolls, customs, rights, jurisdictions, liberties, franchises, privileges, profits, commodities, advantages, emoluments and hereditaments whatsoever, with all and singular their and every of their appurtenances, of what nature or kind soever, or by whatsoever names the same are or have been called or known, situate, lying and being, or at any time reputed, taken or known to belong unto the said pieces or parcels of ground and premises, thereby granted or mentioned or intended to be granted, or any of them, within the said several counties of Northampton, Lincoln, Huntingdon, Cambridge, and Isle of Ely aforesaid, or any of them, or elsewhere commonly called or known by the name or names of the 10,000 acres in Peterborough Level or Bedford Level, and the reversion and reversions, remainder and remainders, rents, issues, and profits of all and singular the premises, and of every part and parcel thereof, with all such and the like powers, juris-*

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dictions, rights, franchises, liberties, customs, privileges, advantages, profits, emoluments and hereditaments whatsoever, and in as full large ample and beneficial manner to all intents and purposes as the said late King *James* the Second, or the said *Lawrence* Earl of *Rochester*, *Henry* Earl of *Peterborough*, *Sidney* Lord *Godolphin*, *Robert* Warden, and Sir *Edward* *Herbert*, in trust for the said late Queen *Mary*, or any other person whatsoever theretofore holding or being seised of the premises, had, or ought to have held and enjoyed under the said several recited letters patent, or any other grant or confirmation thereof by the said late King *Charles* the Second, or by King *James* the Second, theretofore made, or by virtue of any act of parliament, or by reason of any prescription, usage, or custom theretofore used, or by any other lawful way or title whatsoever, and in as large and ample manner as their said Majesties, their heirs or successors, could or ought to have enjoyed the same in case the said grant had not been made. Except and always out of such letters patent reserved all and singular royal mines and mines of lead and tin within or upon the premises, or any of them, to hold unto the said *Arthur* Earl of *Torrington*, his heirs and assigns for ever, from and immediately after the death of the said late Queen *Mary*, or the surrender and forfeiture, or other sooner determination of the said estate of the said Earl of *Rochester* and others, in case the said grant to them be good and valid: but if not good or determined, then from and immediately after the making of this grant, to the only use and behoof of the said Earl of *Torrington*, his heirs and assigns for ever, to be held of their said Majesties, their heirs and successors, as of the manor of *East Greenwich*, in the county of *Kent*, by free and common socage, at the yearly rent of 13s. 4d. payable to the receiver general for the county of *Huntingdon* for the time being, in lieu of all rents, services, and demands whatsoever, with all arrears of rent, mesne profits, and

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sums of money then outstanding and unpaid by reason of the premises.

The next document produced was the will of *Arthur Earl of Torrington*, dated the 17th *March*, 1716, by which he devised all his freehold estates to *Henry Clinton*, Earl of *Lincoln*, for life, with remainder to his first and every other son in tail.

It was then proved on the part of the defendants that *Henry Clinton*, Earl of *Lincoln*, died, leaving *Henry Earl of Lincoln*, his eldest son, who afterwards suffered a recovery of the lands, &c. comprized in the letters patent, and by indentures of lease and release of the 12th or 13th of *October*, 1744, limited the same lands subject to certain previous charges, to himself for life, with remainder to his first and other sons in tail.

It also appeared in evidence, that in the 29th *Geo. II.* an act of parliament was passed for authorizing the sale of the lands in question; and that under that act they had been conveyed to the present defendant *Lord Eardley*, then *Sir Sampson Gideon*.

To rebut the presumption arising from these proofs in favour of the defendant, evidence was produced on the part of the Crown, from which it appeared that King *Charles the Second*, by letters patent dated the 13th *November*, 1660, demised the tithes of all extraparochial lands in the great level of the fens, called the *Bedford Level*, &c. to *Sir William Berkley* and *Sir Gascoigne*, to hold to them, their executors, administrators, and assigns, for the term of 31 years, yielding and paying therefore to his Majesty, his heirs or successors, one-fourth of the annual profit of such tithes. That by other letters patent of King *Charles the Second*, dated 14th *December*, 1661, which were recited in the grant to *Arthur Earl of Torrington*, the King granted the 10,000 acres in

question to his brother *James Duke of York*, his heirs and assigns for ever: and that on the 28th *August*, 1685, *James the Second* granted the same 10,000 acres which had been granted to him when Duke of *York*, by the preceding letters patent to *Lawrence Earl of Rochester* and others, their heirs, &c. during the life of his consort *Queen Mary*, in trust for her or her assigns.

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In these grants the description of the lands, &c. granted, were the same as that in the letters patent to *Arthur Earl of Torrington*, except that, in the general words, the word *tithes* was not inserted.

It also appeared that on the 9th *November*, 1703, above twelve years after the grant to *Lord Torrington*, *Queen Anne* by letters patent demised the tithes of all extraparochial lands within the great level, called *Bedford Level*, which had been comprized in the lease to *Berkley* and *Gascoigne*, to *Samuel Hastings*, Gent. for the term of 31 years from the date of such letters patent, which letters patent and lease being granted in trust for *Doctor Thomas Vernon*, *Hastings* by deed assigned the same to him for the residue of the term of 31 years. That in *March* 1712, *Doctor Vernon* by deed surrendered the last mentioned letters patent to her Majesty, who thereupon by other letters patent, dated the 29th of *March*, 1712, demised the same extraparochial tithes to *Sir John Shaw*, Bart. his executors, administrators, or assigns, for the term of 31 years, with a reservation to her Majesty, her heirs and successors, of one-third of the annual profits. That in *Michaelmas* term 1712 following, *Sir John Shaw* as lessee of the Crown under the last-mentioned letters patent, filed a bill in the Exchequer against *Robert Topping* and others, occupiers of extraparochial lands within the *Bedford Level*, under leases from *Lord Torrington*, for an account of tithes taken by them from the lands in their occupation, to which bill the defendants put in an an-

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swer, in which they set up a modus of 4d. per acre, payable to the Crown in lieu of all tithes in extraparo-chial places within the level; and that in *May* 1714 a decree was made, by which it was decreed that the defendants should account to the plaintiff for their tithes.

It also appeared that on the 19th *July*, 1748, *Henry* Earl of *Lincoln* being at that time tenant for life under the indentures of the 13th and 14th *October*, 1744, procured letters patent from the Crown, whereby all the tithes or tenths arising, &c. within the *Bedford Level*, were demised to him for the term of 31 years. These letters patent contained similar reservations to the Crown of one-third of the full annual value of the tithes granted, with those contained in the preceding leases to *Berkley* and *Gascoigne*, and Sir *John Shaw*, with a proviso that if the Earl of *Lincoln* should not yearly duly collect and bring the tithes, thereby demised, in charge for the use of his Majesty, his heirs and successors, or should neglect to account for the one-third part of the value of the same, upon oath in manner therein mentioned, the grant should be void, and on the 2d *May*, 1755, *Henry* Lord *Lincoln* executed an indenture of that date, whereby, after reciting the last grant to him from the Crown, he granted an underlease of all the tithes in question, except those arising from lands in his own occupation, to *Henry Reade*, with a reservation to himself of two full third parts of the annual produce, and in the deed by which that grant was made was contained a covenant, whereby it was declared, that in case any of the occupiers or owners should deny the right of the Crown to any such tithes or tenths, or the King's power to make a grant of the tithes of any such lands to the said Earl as aforesaid, or should refuse or neglect to pay, render, or set out any tithes for the same, upon any pretence whatsoever, it should be lawful for the Earl to sue, and thereby to try the right of the Crown to such tithes so

to be denied or disputed, and to recover the same as extraparochial tithes: and it was further declared and agreed that the said *Henry Reade*, his executors or administrators, should not be entitled to take or receive any tithes or tenths for any of the lands belonging to the said Earl of *Lincoln*, his heirs, executors, or administrators, which then were, or thereafter might be, deemed extraparochial, or subject to the tithes or tenths granted in or by the said recited letters patent, but that he the said *Henry Earl of Lincoln*, his executors, administrators, and assigns, should be entitled to have, take, receive, or retain all the tithes or tenths of such lands, in such manner as if the deed had never been made.

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The copies of several accounts from the Auditor's Office were also produced on the part of the Crown, for the purpose of shewing that the tithes in question had been duly kept in charge within 60 years previous to the filing of the information. The returns produced were all part of the accounts of the Receivers-General of the county of *Lincoln*; and the first purported to be a return of 63*l.* 11*s.* 5*d.* received on account of one-third of the annual profits of the extraparochial tithes within the great level, *alias* the *Earl of Bedford's Level*, *Bolingbroke Fen*, and *Thomas Level*, and in *Thomas Monson's Level* in the occupation of *Robert Topping* and the other defendants, in the suit brought by Sir *John Shaw*, for one year ending at *Michaelmas* 1715.

The next return was of the casual revenue arising from one-third part of the tithes of the extraparochial lands in a place called *Bedford Level*, for 18 years, ending at *Michaelmas* 1744. Upon this the return was "*Nil*," Then followed several other returns to the same effect, from that period down to 1st *October*, 1770, upon all of which "*Nil*" was returned.

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The *Solicitor-General* having rested his case on the right of the crown to the tithes arising from lands in extraparochial places,

Mr. *Shadwell*, Mr. *Sugden*, and Mr. *Sidebottom* for the defendants, argued as follows:

1. It has been assumed by the *Solicitor-General*, that the crown is entitled to the tithes of extraparochial places: but there is no decision to that effect, except in the instance of places within forests, in 1 Rolle's Abridgment (a); the words there are "*forests et hujusmodi.*" The cases referred to are 22 Ass. pl. 75, and that of the prior or bishop of *Carlisle*, which appears by the second Institute, (b) to have been adjudged in the 18 Edw. I. all these cases limit the right of the King to tithes, to extraparochial places in forests, by reason of his right in forests. In the Doctor and Student it is said, that owners of lands in extraparochial places, may assign their tithes to what spiritual person they will.

2. But if the King be entitled to tithes in extraparochial places, it is quite clear that the tithes in question in this cause must have passed under the grant to Lord *Torrington*. It will not be denied but that where there are the words "*of our certain knowledge, mere motion,*" in a grant from the crown, the grant shall be taken as strongly against the King, as if a common person had made the grant. (c) Therefore in this case if there be any doubt, the grant is to be taken in the most liberal and beneficial sense. Although the words in the grant are not very accurate, yet still there is sufficient to shew that tithes were intended to pass. The

(a) 1 Roll. Ab. 657.

(b) 2 Inst. 647.

(c) Lord Chandos' case, 6 Co. 56. Plow. 332.

word *hereditament* alone would be sufficient for that purpose, *Dowse v. Reeves* (d). In 2 Roll. Abridgement, 194, it is said "that where the King grants all his lands and hereditaments, of such a priory in such a city, a mill whereof the King is seized with other lands, parcel of the said priory, shall pass by the general words, though a mill ought to be demanded by a writ in a special manner:" but here we have the word *tithes* to which no meaning can be attributed, unless we suppose it was intended that the tithes in question should be granted. What other tithes are there which can be comprehended in these words? In many cases things which are totally distinct have been held to pass by general words, as adjunct or appendant to the land, as in *Bronker v. Robotham*, (e) where under a grant by the crown of the manor of "*Sandridge, nec non omnia, terras & tenementa sua in Sandridge dicto nuper monasterio pertinent*": *nec non omnia, terras et tenementa sua dicto manerio de Sandridge pertinent*:" the manor of *Newnam* which extended into the parish of *Sandridge* was held to pass. A similar construction was put upon a grant of the crown in the *Queen v. Lewis and Green*. (f) Many cases of a similar description occur in Rolle's Abridgement (g) and in the case of the *Abbot of Strata Mercella*: (h) it was resolved, that "where the Queen grants a manor to a man and his heirs, and within the same manor to have waifs, estrays, *bohum et catalla felonum &c. dicto manerio spectant & pertinent*": although the goods and chattels of felons can by no usage or time be appendant or appurtenant to a manor, yet they shall pass, although they were never demised nor used with the manor." All these cases shew that by the insertion of a matter in the general words of a grant, that matter will pass, although it has no con-

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(d) 2 Bos. & Pul. 678.

(g) 2 Roll. Abr. 184, 185.

(e) 1 Leon. 120.

(h) 9 Co. 27. b. 2 Roll. Ab.

(f) 1 Leon. 119.

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nection with the subject of the grant. Upon the same principle the tithes in this case passed by the general words.

It is said that at the time this grant was made, the tithes were in lease: no lease however has been produced of these specific tithes; the leases produced are all of tithes in the *Bedford Level* generally, and there is no evidence to shew that the tithes in question were ever received by the lessee. Supposing however that they were in lease at the time of the grant, it is to be recollected that the lease was about to expire, and did actually expire within a year afterwards. The reversion of these tithes was therefore in the crown at the time of the grant, and we contend that the word *tithes* is sufficient to pass this reversion.

3. But admitting that these tithes did not pass by the grant to Lord *Torrington*, we contend that the crown has not been in the perception of them within 60 years, and that it is therefore barred by the operation of the *nullum tempus* act. (i) It does not appear that there is any standing in charge, or *insuper* upon record within the period required by that act. The documents produced are merely accounts from the auditor's office, and from these it appears that ever since the year 1715, nothing has been received in respect of these tithes. Supposing however that this is a sufficient putting in charge within the second section of the Act, yet unless that has been followed up in the manner directed by the last section within the 60 years, it can be of no avail. Although by the second section, a putting in charge by the auditors appears to be sufficient to bring it within the exception, yet the last clause declares that no putting in charge or standing *insuper*, &c. shall be deemed a

(i) 9 Geo. 3. c. 16.

putting in charge and standing *insuper*, unless the manors, &c. so put in charge, &c. have been or shall be upon some information, &c. ordered or decreed for his Majesty within the space of 60 years. The true construction of the act therefore is, that although there has been a putting in charge within the meaning of the second section, yet unless it has been followed up by some suit or information within 60 years, the merely putting in charge by the auditors is a nullity.

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The *Solicitor-General*, Mr. Clarke, Mr. Roupell, and Mr. Pemberton, for the crown.

1. It has been contended that the right of the crown to tithes in extraparochial places is confined to such places as lie in forests, and that when disafforested the tithes belong to the crown, not because of its general right to tithes in extraparochial places, but because of the right which it has by its prerogative over forests: but the effect of all the authorities is, that the right of the crown extends over all extraparochial places whatever. Both in *Comyns* (*k*) and *Bacon* (*l*) it is so laid down expressly; and the latter book refers to the 2 Inst. 647. which has been cited in behalf of the defendants. In *Wright v. Wright*, (*m*) Sir Edward Coke states this to be the case, and gives the reason for it, and in *Banister v. Wright* (*n*) we find the same doctrine, which is also to be found in Toller (*o*) and other text writers. In no instance is this right of the crown to tithes in these places put upon the ground of the land in respect of which they are claimed, being part of a forest, but it is laid down in all the books that the crown is entitled *jure coronæ* to the tithes of all extraparochial places whatever.

(*k*) Com. Dig. 3.

(*n*) Styl. 137.

(*l*) Bac. Abr. tit. Tithes, G.

(*o*) Toller 13.

(*m*) Cro. Eliz. 512.

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2. These tithes having been clearly the property of the crown previously to the grant to Lord Torrington, we are now to consider whether they passed by that grant.

It has been argued that wherever the words *ex certa scientia & mero motu* occur, a grant from the crown is to be taken in the sense most favourable to the grantee: but all the cases shew that the King's grant notwithstanding these words shall not be construed to grant any thing against his intent, as in the case of *Allon Woods* (p). Where it is observed that "it is well said in Plowden, fol. 333. (q) which is true, that when the patent is made *ex gratia speciali certa scientia et mero motu*, (r) that it shall be favourably taken for the patentee: but that is as to the thing expressed in the patent which the words shew to be intended to pass, but the same will not make another thing pass which is not expressed." There is nothing here to shew that tithes were intended to pass, *Bronker v. Rowbotham* and the *Queen v. Lewis and Green*, merely determining that against express words no favour is to be shewn to the crown: but on the other hand we have the case of the river *Banne* (s), which proves that the King's grant shall pass nothing by implication. There a grant of the land adjoining the river was held not to pass the fishery, although there was an express reservation of two thirds of the fishery.

It has been argued that tithes will pass under the word hereditaments, and *Dowse v. Reeves*, and 2 Roll. Abr. 194. have been referred to in support of that proposition. *Dowse v. Reeves* was the case of a devise; the deed referred to a will, and the Court were satisfied the intention of the will was to pass *tithes*. The passage in

(p) 1 Rep. 46.

(s) Davis 55. Vin. Prerog.

(q) Ante.

133. a.

(r) 4 Rep. 35. a. 6 Rep. 56.

Rolle's Abridgment (t) amounts to no more than this, that where the King grants all his hereditaments in A. a mill in A. shall pass, and there is no doubt that under the same words tithes in A. would pass. This grant however is not expressed in such general terms; the hereditaments granted are expressly confined to such as were parcel of the 10,000 acres which had been granted to the Duke of York, and which are described to be of the yearly value of 3000*l*. This clearly shews what it was the Crown intended to grant, we know that in the grant to the Duke of York the tithes were not included, and that in fact at the very time of that grant they were held by *Berkeley* and *Gascoyne* under a lease which did not expire till a year after the grant to Lord *Torrington*. But then it is said that the word *tithes* amongst the general words which follow will pass the tithes in question. But can it be contended that tithes which can only pass by a special description can pass as an adjunct to things, that have been expressly described? It is to be recollected, that at the time of this grant, the reversion only of the tithes was in the crown, and that all the crown was entitled to, was the rent reserved by the lease to *Berkeley* and *Gascoyne*. The grant contains no words to pass this rent, although all the rents accruing under other leases are specifically noticed. It is rather singular it should not have been noticed in the case of tithes of such great value. The argument used by the defendant amounts to this, because you can find no other tithes to answer the word tithes, which occurs amongst the general words, these tithes must have passed: but it is not necessary that every word in a general description should have something to answer it, if it were what is to pass by the words *oblations* and *obventions* which follow. Nothing of that kind could occur in an extraparochial place. The proposition we contend for is, that things in

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gross will not pass when introduced in words of general description after a particular description of the thing intended to pass, and none of the cases cited on the other side in any way impugn this doctrine.

It is very extraordinary that the claim of Lord *Torrington*, or of those who derive title under him to these tithes, should never have been set up before. Even in the suit filed against his tenants by Sir John *Shaw*, the defence set up was, not this grant, but a *modus* of 4d. per acre; and it is in evidence that Lord *Lincoln* himself at the time he was in possession of these lands under the grant to Lord *Torrington* accepted a lease of these very tithes from the crown.

3. But it is said, that even if these tithes did not pass by the grant to Lord *Torrington*, yet the defendants are protected by the operation of the *nullum tempus* act. (u) The answer we give to that is, that the tithes were in lease under the demise to Lord *Lincoln* till the year 1779, which is evidence of the right of the crown to them up to that time. At the expiration of that lease the title of the crown to these tithes in specie accrued, and ever since that time we have evidence to prove that they have been kept in charge to the present period according to the second section of the Act (u). Putting in charge before the auditors is a sufficient putting in charge to bring the case within the exception to that act. The last clause of the Act relates only to concealments, and has nothing to do with the present title. That the return of *nil* is a sufficient putting in charge within the Act has been decided by Mr. Baron *Graham* at *nisi prius*, in a case which was tried on the Midland Circuit, and no attempt was made by the counsel employed on that occasion to disturb the verdict which was given in favour of the crown.

(u) 9 Geo. 3. c. 16.

LORD CHIEF BARON.

This is an information filed by his Majesty's *Attorney-General* against Lord *Eardley* and other persons who occupy lands as tenants of Lord *Eardley*. Lord *Eardley* does not appear to have been in the occupation of any of this land himself: but it is said that he has received from his tenants the value of the tithes, and ought to account for that value.

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It is admitted that the lands and tithes demanded by this information are extraparochial; and it is said on the part of the Crown, that the King is entitled *jure coronæ* to the tithes of all extraparochial places. The answer to this on the part of the defendants is, 1. That the King is not entitled generally to the tithe of extraparochial places. 2. That if he be, the King in this instance has granted the tithes in question to Lord *Torrington*, under whom Lord *Eardley* derives title. 3. The third ground of defence is, that if the title set up under Lord *Torrington* cannot be sustained, the Crown is barred by the operation of the statute 9 *Geo. 3. c. 16.* commonly called the *Nullum Tempus* act.

1. With respect to the first objection, namely, that the Crown is not entitled generally to the tithes of extraparochial places, according to the best view I can take of the case, I am prepared to say, that the Crown is entitled to tithes upon all lands which are extraparochial, unless a title to them can be made out by grant or otherwise. Tithes are a very special description of property; they belong not to the owner of the land which produces them, nor to the proprietor of the animals which yield the titheable increase, but to some other person; and as far as we can trace they did not originally belong to any particular person, but it was left to the discretion of the owner of the land to distribute them for the benefit of the clergy and other objects of charity. In process of time, but

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when in particular has not been accurately ascertained, it became part of the common law of the land that the tithes accruing in different parishes should be applied to the parson of each particular parish. We know that, according to the feudal system, all land is supposed to have flowed from the Crown; and any part which has not been disposed of by the Crown is by law held to be still in the Crown: but it does not appear from any thing we can find in the books, that in ancient times the Crown had any more interest in tithes than another person, except that being a *mixta persona* the King might claim tithes for his own benefit in his ecclesiastical capacity.

It has been contended on the part of the defendants, that all the cases confine the right of the Crown to tithes, to extraparochial places in forests, by reason of his right in forests: but it is known that some forests, or parts of forests, are in parishes, and that others are extraparochial, which renders it difficult to ascertain why the tithes of forests which are extraparochial should belong to the Crown, when those which arise in those forests which are within parishes, belong to the parson, unless the right of the Crown extends to all extraparochial places: and I think that if we look through all the cases which occur in the books on this subject, we shall not have much difficulty in coming to the conclusion which has usually prevailed, namely, that tithes in all extraparochial places belong *prima facie* to the Crown.

In Rolle's Abridgement (x) it is said, "The King shall have the tithe in places which are out of any parish *come en forests & hujusmodi*, and may grant them by his letters patents, and the patentee shall have them." This is certainly, when considered, a very general proposition; and amounts to this, namely, that the King shall have

(x) 1 Rolle Ab. 657.

the tithes in places which are extraparochial, as for instance forests *et hujusmodi*. The words *et hujusmodi* must apply to something in the nature of a forest which is not within a parish. Then in the next case, (*y*) which is that of the prior or bishop of *Carlisle*, it is stated that the tithes of land within a forest which is out of any parish belong to the King; and then it goes on to assign as a reason, because he is "*foresta prædicti villas ædificare, ecclesias construere, terras assertare, et ecclesias illas cum decimis terrarum pro voluntate sua cuiusque voluerit conferre potest, eo quod foresta illa non est infra limites alicujus parochiæ.*" This passage appears to qualify the preceding one, which is very general; it is there said the King shall have the tithes of the forest which are not parochial, and gives as a reason that he may apart lands and give the tithes to any body according to his will, which no other person could do by the common law.

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In *Brooke's Abridgement* (*x*) it is said, that "the King has the tithes of places in great forests, such as *Inglewood, Rockingham, Shirewood, et hujusmodi*, which are out of any parish; and the bishops shall not have them." Now this is equivocal; the rule as here laid down inclines against the proposition which appears to arise out of it, as stated in *Rolle*. I should conceive *hujusmodi* in this case to mean such great forests as he had before-mentioned by name. But then we have the case of *Banister v. Wright*, (*a*) which occurred in the 24 *Ch. 1.* where it was said, that "tithes which lie not in any parish are due to the King;" that is a very general proposition. And then the case goes on, without qualifying or repeating the first passage, to say that "the lands must be parcel of a parish, either by prescription or by act of parliament, and that lands lying within a forest do not pay tithes, for they

(*y*) 1 *Rolle Ab.* 657.

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(*z*) *Br. Ab. tit. Dismes*, pl.

(*a*) *Style*. 137.

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are in the hands of the King : but if the lands be disafforested, if they be within a parish, they ought to pay tithes of course to the parson of the parish, for the King's right was only for the time, while they were in his hands, the meaning of which must be, that if the lands be disafforested, that part only which lies within a parish is to pay tithes to the parson : but that part which does not lie within a parish must pay tithe to the King, who by the first general proposition is stated to be entitled to the tithes of all places which do not lie in any parish.

In the second institute (b) it is said, that by the canon law the bishop is to have all tithes growing in lands not assigned to any parish within his diocese : yet this canon being against the law of the land never had allowance within this realm ; for in such parts of forests as are out of any parish the King shall have them. Here it is specified of forests particularly : but the first part of the passage is, that the Bishop is to have all tithes growing in lands not assigned to any parish by the canon law, but not by our law, for the tithes of forests, or any parts of forests, as are out of any parish belong to the King. It is quite clear he means that the general case which he put first should cover the whole. Sir *Edward Coke* then adds the case of the Prior and Bishop of *Carlisle*, of the grant by *Edward* the First of the tithes of land in the forest of *Deane*, which were not within any parish ; upon which grant there have been two cases in this Court within my own recollection, in which it was generally conceded that the tithes in extraparochial places belonged to the King.

Sir *E. Coke* afterwards, (c) in commenting upon the statute 2 *Edw.* 6. says, that where the King ought to have the tithes within the wastes or commons in his forests

(b) P. 647.

(c) 2 Inst. 651.

which are not within any parish, the branch of the statute he is then speaking of, gives the tithes of the increase of cattle to the parson of the parish where the owner dwells. Here the word *forests* is used: but I think the same construction which I have put upon the previous passage must be applied to this.

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In *Wright v. Wright* (d), Sir *Edward Coke* is reported to have said, that “before the Council of Lateran tithes were not payable here to certain persons nor to places, which is the reason also why the King shall have tithes of lands out of any parish, because the council extended not to them.” Now although it appears in that report that Sir *E. Coke* was only counsel in the case, yet we know that the author of those Reports, as well as Sir *E. Coke* himself, states his arguments, if they were not contradicted, as understanding them to be founded on the law of the land, so that we may take this as what Sir *Edward Coke* without contradiction stated to be the reason of the King’s being entitled to the tithes of lands in extraparochial places.

Sir *Simon Degge*, (e) whom I have always understood to be a writer of authority on this subject, says “it has been resolved both by Parliament and several judgments at common law, that all extraparochial tithes belong to the King, who is a mixed person, and capable of tithes at common law in perannuity.”

Comyns’s Digest (f) puts the same construction upon the case as I have done; and in Bacon’s Abridgment (g) it is said, that “as the appropriation of tithes in consequence of the decretal epistle of Pope *Innocent III.* extended only to parochial tithes, all the tithes of extra-


(d) Cro. Eliz. 511.

(f) Tit. Dismes 3.

(e) Parson’s Counsel, 227.

(g) Tit. Tithes G.

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parochial places continued to be due to the King, and consequently all extraparochial tithes of which no grant has been made are at this day due to the King."

In addition to the authorities I have before referred to, we have that of Mr. Justice *Blackstone*, who says, that "the tithes of extraparochial places are now by immemorial custom payable to the King instead of the bishop, in trust and confidence that he will distribute them for the general good of the church." Upon the whole, therefore, it appears to me, that in the cases referred to, the word *forest* is used rather to express any sort of land not within a parish, than as confining the King's right to forests strictly so called. It is impossible to draw any other conclusion, unless some authority were produced which would not bear the same interpretation, which has not been done.

When, however, I say that no authority for a different construction has been produced, I mean to except a chapter in the book called *Doctor and Student*, (*h*) which appears to sanction the doctrine that the owners of land in extraparochial places may assign their tithes to such spiritual person as they please, as was the case with respect to all tithes before the decretal epistle by which persons were compelled to render their tithes to the parson of their own parish; the authorities, however, which I have cited, appear to me to be entitled to greater weight than the *Doctor and Student*. We must also remember, that in the case before us the freehold of all these lands was in the King; and therefore, according to the doctrine laid down in the *Doctor and Student*, he might assign the tithes to whom he pleased; and he has assigned them, as the *Attorney General* contends, to certain leasees, which takes from the defendants the benefit of that doctrine.

(*h*) Dial. 2. Add. c. 12. p. 336. ed. 1787.

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Having established that these tithes were originally in the King, we come, in the next place, to consider whether he has granted them away to any body else. The counsel for the defendants contend, that it is immaterial to consider to whom the King has granted these tithes. If he has granted them at all, they are not in the Crown; and the very statement of the case made by the defendants shews that the enquiry whether the Crown is entitled to tithes in extraparochial places is merely a matter of speculative research, and has very little to do with the present question. It is clear from their statement, that the Crown was entitled to these tithes from time immemorial, and the title under which they claim is a grant from the Crown, and this precludes them from saying that the Crown never was seised of these tithes.

The first instrument which has been produced is a lease dated the 13th of Nov. 1660. by which Charles II. demised to *Berkeley* and *Gascoyne* all the tithes arising, &c. within the *Bedford Level*, "and also the tithes of the lands lying without the boundaries of any parish, and not rightfully or lawfully belonging to any church, nor to any rector, nor proprietor in right of any church or rectory whatsoever, except the tithes of 600 acres theretofore demised and granted to Sir *W. Becher*. To hold to *Berkeley* and *Gascoigne* for the term of 31 years, yielding one fourth of the annual value of such lands, &c." This lease was made in the 13th of *Charles I.* Nov. 2.; and in the 15th of *Charles II.* the act for settling the *Bedford Level* was passed, by which it appears that out of the 12,000 acres belonging to the Crown, 2000 acres had been granted to the Earl of *Portland*. The King therefore had a freehold in 10,000 acres only. In the month of *December 13 Charles II.*, being only one month after the demise of all the tithes to *Berkeley* and *Gascoigne*, King *Charles* makes a grant, to the Duke of *York* and his heirs of certain lands amounting to 10,000, being all the lands

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belonging to the Crown, except the 2000 acres granted to the Earl of *Portland*, subject to a demise to Lord *Ossory* for 31 years. Now this grant being made only a month after the demise of the tithes to *Berkeley* and *Gascoigne*, and the word *tithes* not occurring in it, it is clear that the tithes were at that time in *Berkeley* and *Gascoigne*, by virtue of their lease, which was to last till the year 1692.

On the 28th of *August*, 1685, the Duke of *York* having become King, made a grant of these lands, expressly mentioning them to have been granted to him by King *Charles* the Second, to Lord *Rochester* and others for the benefit of the Queen. By this grant nothing passed, but that which had passed to the Duke of *York* by the grant of King *Charles* II. so that the Queen's trustees took the lands subject to the tithes, as the Duke of *York* had taken them before. It is very evident that they did not pass either by the grant of King *Charles* to the Duke of *York*, or by his grant to the Queen's trustees: but that they remained in *Berkeley* and *Gascoigne* till 1692, as there is no trace of any surrender from them. So that the Crown had only the reversion of the tithes expectant on these leases.

After the expiration of the lease to *Berkeley* and *Gascoigne*, the tithes became the immediate property of the Crown; and nothing appears to have been done with respect to them till the reign of Queen *Anne*, unless we suppose according to the argument of the defendant's counsel that they were granted to Lord *Torrington*: but laying that for the present out of the question, nothing appears to have been done with the tithes till the 9th of Dec. 1703, when Queen *Anne* demised the tithes which had been formerly granted to *Berkeley* and *Gascoigne* to *Samuel Hastings* for 31 years, and on the 29th of *March*, 1712, when we find other letters patent by Queen *Anne*,

by which, after reciting the grant to *Hastings*, and that they had been assigned by him to Doctor *Vernon*, and by him surrendered to the Crown in favour of Sir *John Shaw*, the same tithes are granted by the Queen to Sir *John Shaw* for 31 years from that time. This lease would have continued till 1743.

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We now come to a very important document indeed. The grant to Lord *Torrington* on which the defendants rely is dated in 1690: but in *Michaelmas* Term 1712, being only a few months after the lease to Sir *John Shaw*, a suit was instituted by that gentleman against 40 occupiers of the lands which had been granted to Lord *Torrington* for the tithes of those very lands; and those defendants instead of insisting upon a grant of those tithes to their landlord, which would excuse them of course from rendering tithes to the lessee of the Crown, put in an answer in which they insisted upon a *modus*, and entered into evidence to establish that *modus*: but the Court was of opinion that such evidence was insufficient; and in *Easter* Term, 1714, the Court directed an account of tithes in kind; so that in 1714 there is a distinct and conclusive judgment of this Court in favour of the Crown against the then defendants, they being at that time occupiers of these lands as tenants to Lord *Torrington*. This decree was submitted to, and no appeal has ever been made against it. It has been suggested that Lord *Torrington* may not have been aware that this suit was instituted: but I cannot act upon such a supposition.

After this it seems that Lord *Torrington* parted with the premises which had been granted to him by *William* and *Mary*; and in 1744 they passed into the hands of Lord *Lincoln*, who became possessed of them as tenant for life. The lease of the tithes to Sir *John Shaw* expired in 1743, from which time they continued in the

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Crown until the 19th of *July*, 1749, when, in consequence of Lord *Lincoln's* application, a lease of these very tithes was granted to Lord *Lincoln* for 31 years, reserving a rent of one third. This lease continued till 1780. Now on the 2d of *May*, 1755, Lord *Lincoln* being possessed of these tithes, executes a deed, in which after reciting the grant of the Crown, of the tithes to him he, by force of his lease, makes an underlease of them to *Read*, reserving to himself two thirds of the clear profit; and in that deed he covenants, that if any of the occupiers should deny the right of the Crown to such tithes, or should refuse to set them out, it should be lawful for Lord *Lincoln* to sue for such tithes as extraparochial, &c. This instrument I think would have been conclusive evidence against Lord *Lincoln* if he had been the owner of the fee: but it is said that Lord *Lincoln* was only tenant for life, and that therefore his act could not bind the remainderman under whom the defendants claim. But, according to my apprehension, it is impossible to come to any other conclusion than that at which I have arrived. Supposing there had been no lease, and the Crown had instituted a suit against Lord *Lincoln* for tithes, and a decree had been pronounced against him,—would there be any doubt as to such decree being good evidence as to these tithes? Do I not then see in this case that which is much more strong than a decree? Though there is no decree against him, Lord *Lincoln* accepts from the Crown a lease of these very tithes, and undertakes to pay a rent for them; and not content with that, he sub-grants it to *Reade*, reserving an increase of profit to himself. This does appear to me to be a very strong piece of evidence in favour of the Crown.

Thus we see the Crown has exercised a constant ownership over these tithes from the time of the Restoration. In 1744, we have a decree in favour of the Crown in an adverse suit. In 1749, we find an owner of

the freehold accepting a lease of these tithes to continue till 1780. We find him acting upon that lease which is a strong corroboration, and there is not the least evidence to shew that any other person has received or claimed title to these tithes. It is quite clear that till the lease to the Earl of *Lincoln* in 1749, the tithes were always in different hands from the owners of the soil.

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We come now to the question arising upon the grant to Lord *Torrington*, which is a very important document. It is a grant made by the Crown to Lord *Torrington*, the 14th of *May*, 1690, in which these words occur: "Our will and pleasure is, and we do hereby of our more abundant grace, certain knowledge, and mere motion." With respect to these words I entirely concur with the observation of counsel, that there is a virtue attributable to them which does not belong to a grant of the Crown if they are absent; and I am disposed to construe this as a transaction between man and man. At the same time to prevent misconstruction, I must observe that there is a difference between a grant from the Crown with these words, and a grant from one man to another. But construing this as a grant from man to man, I find it utterly impossible to persuade myself that it was intended to pass the tithes in question. The description of the premises is clearly of the 10,000 acres granted to the Duke of *York* by the letters patent of the 14th of *December*, 1661, and afterwards by him granted to trustees for his Queen; and unless it can be contended that the tithes passed under the general words, "All gardens, orchards, wastes, *tithes*, oblations, obventions, waters, watercourses, &c." there is no pretence to say they were included in this grant; and certainly the tithes would not pass by these general words. With the exception of the word *tithes*, the descriptions in the grant all apply to land; none of them are consistent with the notion of a grant of tithes. The grant points out

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reversions which existed in the land ; and not one word is said as to any reversionary interest in the tithes, the reversion of which was then undoubtedly in the Crown. And then if we consider that soon after this grant was made, a suit was instituted by Sir *John Shaw* against the tenants of the person to whom that grant was made, and the nature of the defence to that suit, it is evident that at that time it was considered that the tithes had passed under the lease to Sir *J. Shaw*, and were actually the property of the Crown in reversion, though at the moment they were in the hands of the lessee ; I cannot avoid considering that suit as a kind of contemporary construction of the grant.

A question then arises, whether the reversion passed, the reversion to these tithes being in the Crown at the time the grant was made. But to this part of the case the observation I made respecting the grant of Lord *Lincoln* applies. I do not mean to say, that if there were any other evidence to oppose it, it might not be answered : but there being none in the present case, I cannot come to any other conclusion than that to which I have arrived.

But then it is said, that after the period when Sir *John Shaw* received the tithes in 1715, there is no evidence of the Crown, or its lessee, having received any tithes, or any compensation in lieu of tithes ; and that though it appears the Crown had been in the habit of exercising ownership by granting leases, yet, as it received no tithes, the act of the 9th *Geo. 3. c. 16.* commonly called the *Nullum Tempus* Act, bars the present claim. To this it has been answered by the *Solicitor-General*, that the act of the Crown in granting leases which come down to 1780, is a sufficient assertion of its claim to take away the effect of that statute ; it is also contended, that the tithes in question have been constantly left in charge,

and evidence is given of their having been kept in charge for a period commencing 18 years previous to the year 1744. Now whether the act of granting leases in the way in which these leases have been granted by the Crown would support the title of the Crown against the act, from the year 1715, is a question which I have not been able to resolve : but if these lands have been in charge, they are unquestionably out of the statute. What does the act mean by being in charge?

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Sir *Edward Coke* (i), in commenting upon the 21st *Jac.* 1. says, "duly in charge in judgment of law is the roll of the Pipe; for although a note before the auditor, or any other person, may be a mean to bring it in question and to be put in charge, yet that is not in judgment of law said to be duly in charge, unless it be in charge of the Pipe." He then says, in commenting upon the word *insuper*, "It cannot stand *insuper*, unless the thing in question were before duly in charge." That was the construction put upon 21 *Jac.* 1. c. 2.; but in the 9th *Geo.* 3. a proviso appears to be introduced for the express purpose of altering the law as it formerly stood. (k) The proviso says, "that where the rents, &c. of any manors, &c. are or shall be in charge, by, to, or with any auditor or auditors, or other proper officer or officers of the revenue, such rents, &c. shall be held, deemed, and taken to be duly in charge within the intent of this act." The evidence here shews, that these tithes have been in charge with the auditors during all the time referred to, down to the present moment; it seems, to me, therefore, that unless you can displace the Crown by means of the grant to Lord *Torrington*, there is no defence here; and being of opinion that no use in the way of defence can be made of the grant to Lord *Torrington*, there must be a decree against the present defendants.

(i) 3 Inst. 189.

(k) Sect. 2.

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The last clause of the act 9th *Geo. 3. c. 16.* has been very much relied upon on the part of the defendants, as controlling the preceding clause: but I think it is only necessary to read the clauses together to shew that they have no connection with each other. It is evident that the last clause was introduced as applicable to cases of concealment, which is not the case here. Therefore I am of opinion that the being in charge by the auditor is sufficient for the purposes of this suit.

With respect to the case which has been cited as having been determined in the county of *Northampton*, although that is only a case at *nisi prius*, and there certainly is not the same respect due to a *nisi prius* decision as there is to one *in banc.*, yet as it bears upon the point, and there is no other decision in any way opposing it; it certainly is entitled to some degree of weight; and in this case I feel the more inclined to treat it with respect, when I see that the counsel who led the cause never attempted to disturb the verdict. I am very glad, therefore, to avail myself of the opinion of the learned Judge who tried the cause, and of the acquiescence of the counsel to sanction the opinion I have formed upon this subject.

I must decree against all the parties according to the prayer of the information, except Lord *Eardley*. It does not appear that he occupies, or ever did occupy, any of this land himself, except a decoy in which there were wild ducks, and I never heard that wild ducks were titheable.

BETWEEN

EDWARD OLIVER and ANN his Wife, and THOMAS MILWARD OLIVER, - - PLAINTIFFS.

AND

RICHARD COURT, THOMAS HILL, FRANCIS RUFFORD, GEORGE WALDRON, Clerk, and RICHARD STOKES, - - - - DEFENDANTS.

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Grays' Inn Hall, Jan. 11, 12, 1820. Westminster Hall, Feb. 3.

THIS bill was filed for the purpose of setting aside a purchase made by an auctioneer, of an estate which he was employed to sell under the following circumstances :

A purchase by an auctioneer of an estate which he had been employed to sell, set aside after a lapse of 13 years.

By articles of agreement, dated the 23d of *March*, 1787, being the settlement made upon the marriage of the plaintiff *Edward Oliver*, with *Ann* his wife, the estate in question was agreed to be settled to the use of the plaintiff *Edward Oliver* for life, *without impeachment of waste*, except voluntary waste in buildings, with remainder to the use of the plaintiff *Ann* his wife for life, with remainder to his first and other sons in tail. The plaintiff *Thomas Milward Oliver* was the eldest son of the marriage. In the month of *March*, 1799, the plaintiff, *Edward Oliver*, having become embarrassed in his circumstances entered into a composition with his creditors; and by indentures of lease and release, of the 29th and 30th days of *March*, 1799, conveyed certain other freehold and leasehold estates which belonged to him, independently of those comprised in the settlement, to the defendants *Hill* and *Rufford*, upon trust, to pay his creditors the amount of their respective debts; and afterwards by other indentures, dated the 15th and 16th of *May*, 1801, in consideration of his being allowed by his creditors an annuity of 150*l.* for his life, he conveyed the

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messuages, hereditaments, and premises, comprised in his marriage articles, being the property in question in this suit, to the same trustees and their heirs, *for all such estate and interest as he then had, or could by any means dispose of*; upon trust to sell and dispose of the same, together with the premises comprised in the indentures of the 29th and 30th of *March, 1799*, either together or in lots or by public auction, or private contract, as to the trustees might seem expedient, and to apply the proceeds in satisfaction of the creditors of the plaintiff *Edward Oliver*, and the surplus to *Edward Oliver*, his heirs, executors, &c.

In order to assist them in the performance of the trusts of the several indentures above mentioned, the trustees employed *Harry Court*, the father of the defendant, who carried on the business of a surveyor and land agent, to survey and value the property conveyed to them by the trust deeds, and amongst the rest the property in question. It appeared at the hearing of the cause, that the defendants, *Court* and his father, had carried on business as surveyors and land agents in copartnership together, under the firm of *Court and Son*, up to *Midsummer 1797*, when such partnership ceased; and the father gave up to the defendant *Court* all that part of the business which consisted of measuring, mapping, and planning, retaining to himself only the valuing business; and that therefore, although *Harry Court* the father was the person employed by the trustees to make the valuation, and took that part of the duty upon himself, the defendant and another person then in partnership with him, assisted in the measuring, mapping, and planning of the estates preparatory to such valuation, which was in fact cast up and completed in the office of the defendant, and by one of his clerks.

The property in question was not valued till *December, 1801*, when the value of the plaintiff's life estate was

fixed at 577*l.* 7*s.* 4*d.*; but it appeared that in making this valuation the timber upon the premises, which was very considerable, and which as tenant for life without impeachment of waste the plaintiff *Edward Oliver* would have been entitled to cut, had not been included. The witnesses examined in the cause varied considerably in their estimate of the value of this timber, some fixing it at 700*l.* and others at 300*l.* The defendant *Court*, however, by his answer, admitted that it was worth from 300*l.* to 400*l.*

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In the month of *February*, 1802, the trustees put up all *Edward Oliver*'s right and interest in the hereditaments and premises comprised in the articles of settlement to sale by public auction; and the defendant *Court* was the auctioneer employed by them on that occasion. Although several persons were in the room at the time, no person offered any thing, and the estate consequently remained unsold. On the next day the defendant *Court* applied to the trustees, and proposed to purchase *Edward Oliver*'s interest in the property in question for 500*l.* This offer the trustees agreed to accept. No written contract was entered into on the occasion: but *Court* was let into possession of the estate within six weeks after the transaction; and in *April*, 1803, *Oliver* joined with the trustees in executing a conveyance of all his interest in the property in question, on which *Court* paid the purchase money to the trustees, but without interest or rent, for the time he had been in possession.

It appeared that at the time of executing the conveyance, the plaintiff, *Edward Oliver*, was resident in the *Isle of Man* for the purpose of avoiding his creditors, and was in fact extremely involved and embarrassed in his circumstances, and that he had come to *England* for the purpose of executing the deeds by

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the desire of his trustees, one of whom, *Hill*, on the 7th of *February* preceding wrote him a letter, saying, that if he delayed doing it his creditors would stop his annuity of 150*l*.

Under these circumstances the present suit was instituted in *Trinity Term* 1815, for the purpose of setting aside the conveyance to *Oliver*, on the ground of fraud ; and for that purpose the bill prayed that the purchase of the plaintiff, *Edward Oliver*'s life interest in the settled estates, might be set aside, and the conveyance executed in consequence thereof delivered up and cancelled, on *Edward Oliver*'s repaying *Court* the amount of his purchase money, with interest, which he offered to do on *Court*'s accounting for the rents and profits of the premises received by him since he had been in possession, and the full value of the timber and other trees cut by him from off the premises, an account of which was prayed in the usual manner.

At the hearing of the cause an attempt was made by the plaintiff to shew that the value of the property purchased, independently of the timber, was much greater than the sum paid by *Court* : but owing to the contradictory evidence, which was read on this subject on both sides, this point was not satisfactorily established. It appeared, however, that before the execution of the conveyance *Court* mortgaged the property as a security for the sum of 800*l*. which he had borrowed to enable him to pay the purchase money. This money was also secured by a bond executed by him, and by an assignment of a policy of insurance effected by him on the life of the plaintiff, *Edward Oliver*. It appeared also, that about four years after the purchase he had let the property to a tenant, at a rent of 235*l*. per annum, and received 400*l*. for the lease. Out of the rent reserved, however, *Court* had to pay the annuity of 150*l*. to *Edward Oliver*, besides a land-tax and chief rent

amounting to 11*l.* 9*s.* 3*d.* *per annum*, which were not noticed in the valuation that had been made previously to the sale.

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Mr. *Jervis*, Mr. *Joseph Martin*, and Mr. *Simpkinson*,
for the plaintiffs.

Although it does not appear that the defendant was the person actually employed to value the property, it is quite evident that he was connected with his father in the transaction, and must have been conusant of its actual value. Supposing there was only a qualified partnership, or that the defendant had acted only as agent for the father,—what difference can that make in equities of this case? The estates were put up to sale by the defendant as auctioneer, and he was therefore agent for that purpose. Previously to that a valuation had been made in the office of the defendant, and by one of his clerks;—can it be doubted that he was privy to the whole transaction?

It is quite clear on the face of the valuation, that something wrong was intended. The property is valued at 232*l.* *per annum*; and some of the witnesses state, that it was worth 300*l.*, and four years afterwards, without any evidence of any money having been laid out, the plaintiff lets it at 235*l.* *per annum*, and receives a premium of 400*l.* No allusion is made to the value of the timber; and before the conveyance is executed the defendant borrows 800*l.* on the security of this very property.

Admitting that inadequacy of consideration is not alone a sufficient ground for setting aside a contract of this description, it affords strong evidence of fraud, which is supported by the fact that the defendant had obtained knowledge of the actual value of the estate, and that he

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was aware of the valuation made by his father. Can such a purchase stand, unless it be proved that the purchaser has communicated to the seller all the circumstances which have come to his knowledge. The rule is, that an agent is bound to make use of all the information he can collect for the benefit of his employer. *Ex parte James (a)*. *Ex parte Bennett. (b)*

But supposing the defendant did communicate to the trustees all the information he had acquired, namely, that the estate was worth 13 years' purchase; that there was valuable timber upon it; and that the annual value was greater than the valuation had fixed: in that case the trustees would have been guilty of a breach of trust which would equally have affected him.

As to the length of time, we admit that if a party co-nusant of his rights, being under no disability, sleeps upon them for a long period, this would furnish a very strong argument against him in a Court of Equity: but where there has been a continuance of the circumstances under which the transaction first took place, as of the distress of the parties, or of improper influence used, the length of time will not be allowed to operate against the title to relief, *Gregory v. Gregory (c)*. In this case, the same circumstance which induced the original conveyance to the trustees, namely, the distress of the plaintiff, continued nearly up to the period of filing the bill. In *Beaumont v. Boulbee (d)*, the period elapsed was much longer than in the present case; and in *Purcell v. M'Namara (e)*, the Court relieved after an interval of 17 years, although the annuity had been accepted in the mean time. In *Wood v. Downes (f)*, the Court interfered after a lapse

(a) 8 Ves. 337.

(b) 10 Ves. 381.

(c) Cooper, 201.

(d) 5 Ves. 485. 7 Ves. 599.

(e) 14 Ves. 91.

(f) 18 Ves. 120.

of 20 years, and that upon the express ground that the plaintiff was at the time of the decree in exactly the same situation of difficulty and embarrassment as he was in at the period of the original transaction.

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Mr. Martin and Mr. Phillimore for the defendant Court.

The question for the decision of the Court is, whether there has been sufficient concealment on the part of the purchaser in this transaction to induce the Court to rescind the contract. It is a question of the first impression; there is no case where it has been decided that an auctioneer is prohibited from contracting. All the cases which have been cited are prior to the judgment of Lord Eldon, in *Andrews v. Mowbray*; (a) and there is none subsequent to that which decides that a party placed in the situation of agent is prohibited from contracting. That case decides that he is not; and, with the single exception, that *Court* had for a time been employed as auctioneer, it resembles this as much as it is possible for one case to resemble another. The difference between the sum given and the value of the estate was indeed much larger in that case than in this.

In the case of *Andrews v. Mowbray*, Sir William Grant says, "I think the plaintiffs have proved *Mowbray* an agent for all purposes necessary to their case;" and then he goes on to say, "Here the allegation is that this agent obtained the estate at an undervalue. That it was competent for him to purchase, dealing fairly, I think cannot be disputed; even a trustee employed to sell an estate may become the purchaser of that estate, if he deals fairly with his *cestui que trust*. State *Mowbray's* employment as agent as high as you will, you cannot bring him into a situation of greater incapacity than that

(a) Wils. Exch. Rep. 81.

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&
Gossett.*

under which a trustee labours." So that, consistently with the view of Sir William Grant, in that case, we should not hazard much if we were to admit, that in this case *Court* was an agent. His purchasing under such circumstances was not contrary to any rule of public policy.

But this bill does not proceed on the ground that the party was in such a situation as prohibited him from purchasing. It merely represents that, previous to the year 1801, *Court* had carried on business in partnership with his father, whom the trustees employed to value the estate. The estate was sold on his valuation, and that valuation is now complained of. This Mr. *Court* was a person advanced in years, and not capable of mapping and planning the estate; and that part of the business was therefore done by the son. *Ex parte James* (a) and *Ex parte Bennett* (b) decide merely that an assignee and solicitor cannot purchase. An assignee has a control over the sale, and can bring it on or retard it at his pleasure; and a solicitor in bankruptcy may do the same. In this case *Court* could neither control nor retard the sale, and he had acquired no knowledge which he could use to his private advantage. A trustee, even, may purchase from his *cestui que trust*, provided there is no fraud in the transaction. *Coles v. Trecothick*. (c) What circumstance of fraud is there in this case? None is even alleged: but the Court is called upon to infer fraud, merely from inadequacy of price. There is nothing in *Court's* situation to preclude him, except his having been the auctioneer. He had been merely employed to map the estate, and never was employed to value it; what he did was done by the direction of his father, and not of the trustees. Can it be contended, that a person who has once filled the situation of auctioneer, can never afterwards purchase. We admit he cannot buy at the auction:—but what reason is there against his buying by private contract? The em-

(a) *Ante.*(b) *Ante.*

(c) 2 Ves. 234.

ployment of an auctioneer is a restricted employment; his duty ceases the moment the auction is over.

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If the defendant was not incapacitated as having been employed as auctioneer, what is there in his conduct, either at the time of the purchase, or of the subsequent conveyance, that should induce the Court to set the transaction aside? There is no evidence to shew that the price given was inadequate: but to assist in making out that case the timber is called in. In answer to that, we say, the defendant did not understand that he was purchasing it; and we are ready to admit, that if the bill had prayed a declaration that the defendant was not entitled to the timber, the Court would have so declared. It is said that he gave 70*l.* less than the valuation: but in *Andrews v. Mowbray* the difference was 1000*l.* less than the sum at which the party himself had valued the property.

This was not a contract personally entered into between Mr. *Oliver* and *Court*, where *Court* might have taken an undue advantage of Mr. *Oliver*: but it was entered into with trustees, whose duty it was to take care of Mr. *Oliver*'s interest. Can it be said, that they were imposed upon?

Then as to the lapse of time; though the plaintiff resided in the *Isle of Man*, he was within the reach of the General Post, and yet no complaint was made for 13 years. In *Gregory v. Gregory*, (a) the Master of the *Rolls* refused to set aside a transaction after a considerable lapse of time, although he said that if it had been recent, it ought to have been set aside; and in *Banney v. Ridgard* (b), Lord *Kenyon* dismissed the bill, merely upon lapse of time, though he thought that it was a

(a) *Comp.* 201.

(b) 1 *Cox* 144.

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case in which, if an application had been immediately made, the Court would have granted relief.

Mr. *Jervis* in reply.

Though I admit that mere inadequacy of price is not alone sufficient to rescind a contract, yet it cannot be denied that it furnishes strong evidence of fraud. How can such a transaction as this be allowed to stand? The defendant, it is clear, had obtained a full knowledge of the value of the property; and it is not pretended that he communicated his knowledge to the party by whom he was employed. Can it be supposed that if he had communicated all he knew to the trustees, that the estate was worth 13 years' purchase; that there was valuable timber which a purchaser might cut down; the trustees would have allowed him to purchase on the terms upon which he did purchase? If so, they would have been guilty of a breach of trust, which would equally have affected them.

In *Gregory v. Gregory*, the *Master of the Rolls* admitted that where there was a continuance of the circumstances under which the transaction first took place, as of distress, &c., the Court would relieve notwithstanding the length of time. Here the distress of the plaintiff did continue. In *Bonney v. Ridgard*, the time was 32 years; and that was not a case between principal and agent, but of an executor.

Lord CHIEF BARON.

This was a bill filed for the purpose of setting aside the sale of an estate of which the plaintiff was tenant for life to the defendant, *Court*, and for consequential directions.

It appears that in the month of *March*, 1799, the plaintiff was seized of certain estates in fee simple, and was

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also entitled, under marriage articles, or settlement, to an estate for life in the property now in question, without impeachment of waste, with remainder to his issue and reversion to himself in fee. It appears also, that having before that time involved himself in difficulties, and being in embarrassed circumstances, he executed deeds, by which he conveyed the estates he had in fee to the defendants *Thomas Hill* and *Francis Rufford*, in trust to sell for the benefit of his creditors; and those estates were accordingly sold, and the produce, I presume, applied according to the trust.

It is, I think, apparent that the produce of those estates was not sufficient to discharge the debts, for the purpose of paying which they were conveyed to be sold; and the plaintiff consequently continuing still embarrassed, he, in the month of *May*, 1801, conveyed the estate, which by his marriage settlement was limited to him for life, and all his interest of every description therein, to the same trustees, *Hill* and *Rufford*, in trust to sell and apply the produce in payment of his creditors, and to pay the surplus to himself.

The plaintiff, as I mentioned before, was tenant for life of this estate *without impeachment of waste*, and had therefore a right to cut timber, provided he did not commit *equitable waste*; that is, he was entitled to commit what is called *legal waste*, subject to be corrected by a Court of Equity, if he exceeded what such a Court would consider it right for a tenant for life without impeachment of waste to do. That part of his interest, therefore, was conveyed to the trustees for sale, together with the estate for life. It should be observed, that the conveyance of this estate was subject to a rent charge of 150*l.*, which the plaintiff reserved to himself; and it also appears that his embarrassments were such that he had withdrawn himself from his creditors to the *Isle of Man*,

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where debtors were at that time more protected than they are now.

The trustees, or those who acted for them, thought it necessary to have the estates valued; and therefore in December, 1801, a measurement and valuation took place. It does not appear very clearly what part the defendant, Mr. Court, took in that proceeding. I think he admits they were measured by him, or under his direction, or with his concurrence: but he says they were valued by his father. It is however evident from the evidence which has been produced, that he had implicated himself in the transaction; and, that even if he did not make the valuation himself, he perfectly well knew what the value of the estate, as set by his father, was.

It is obvious, that in the valuation no notice is taken of the timber. To what that omission is owing does not appear: but it is impossible to doubt that it ought to have been valued, in order to afford a correct estimate of the value of the whole interest. Some of the witnesses state the timber to have been worth 700*l.*, and others 300*l.*: but beyond all question it was of very considerable value. How far the valuation was correct in other respects is not clearly made out: some of the witnesses say that the estate was worth considerably more than the valuation fixed it at; and I do not think any witness supports the valuation made by the valuer, whoever he was.

A natural question in this case is, whether the valuation was fair or not, and clearly the *onus* of shewing that it was, is thrown upon the defendant. But, without entering very much into the accuracy of the valuation, one thing is quite obvious, *viz.* that the timber was not taken into consideration at all; and another thing which is equally obvious is, that no witness has been

brought to confirm the valuation that has been made *independently* of the timber.

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It is observable also, that although the conveyance to the trustees was made in the month of *May*, 1801, being the commencement of the summer, which I have always understood to be the most proper time for offering an estate for sale; the valuation was not made till *December*, and the sale did not take place till *February*, 1802, a time of year when it is hardly credible that any man would set up an estate for sale by auction. It is impossible to contend that such a proceeding could have been advantageous to the plaintiff. The auctioneer employed on this occasion was the defendant *Court*. His business was to sell the property to the best advantage: but, although there was a great number of persons present, there were no bidders, and *Court* afterwards purchased it himself.

He is asked in the bill as to his determination to become a purchaser himself; and it is impossible to look into his answer, without remarking the manner in which he answers this part of the case. He states, that he first thought of becoming a purchaser *about the next day, or about that day*; but he does not know which. It is a very singular circumstance that he should not be able to fix the day. However, it is very clear, that on the very next day he offered himself as the purchaser of the estate. Can it be said, that when an auctioneer determines to become himself the purchaser of an estate, which he is employed to sell, a judge is not bound to raise in his own mind a suspicion that all is not fair? especially when he finds that there was no bidding at the sale, and no subsequent whatever is given of any thing which took place there. Can I doubt in this present case, that the defendant must have determined to purchase the estate, if he could, at the very moment when he reported his

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rostrum? Can such a proceeding be tolerated in a Court of Equity?

Suppose for a moment that he did not make up his mind to become the purchaser till the next day. Can it be proper to allow a person who acts as auctioneer to bargain for an estate which it is his duty to sell? When does the commission of an auctioneer cease? Does it cease the instant he descends from his rostrum? Is not the auctioneer the agent for the parties after he descends? But be that as it may, it is impossible in this case not to discover a connection between the auctioneer and the purchaser. I say the defendant made the purchase as auctioneer. As far as we can collect from the evidence, as soon as he mounted the rostrum he intended to become the purchaser himself. Though a great number of people attended at the sale, no one offered any thing for the estate; and on the very next day this auctioneer goes to the trustees, or their attorney; and although the valuation, which was in a great measure his own, had fixed the estate at 577*l.* 7*s.* 4*d.*, he offers the sum of 500*l.*, which is accepted. In this purchase is included an interest beyond that included in the valuation, namely, the timber, amounting in value from 300*l.* to 700*l.* There is no doubt but if this be a good contract, the defendant bought all the timber during the life of the plaintiff, and had as much right to cut the trees as he had to the estate itself.

Let us see then how the business has been carried on by this auctioneer. On the very day after the auction, following up an intention formed at the time, or very soon afterwards, he becomes the purchaser of what was considered by his father, if not by himself, as worth 577*l.* for 500*l.*; and besides this he purchases the interest of the plaintiff in the timber. It has been said, that

this was a mistake, and beyond all doubt the slightest thing to say of it, is, that it was so. But can I allow an auctioneer to say that he is a fair purchaser, when there is a mistake such as this?

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The transaction took place in *February*, 1802; and I put it to any gentleman at the bar to say, whether, if an application had been made to the Court at that time to set aside this sale, there could have been the least hesitation about it. The case of *Andrews v. Mowbray* is not at all like this case. The cases that apply to this are *Ex parte James*, and that class of cases which have been decided by the *Lord Chancellor* in bankruptcy, in which an agent is held incapable of purchasing. I say here, that if this transaction had not been attended with the circumstances I have alluded to, upon principles of public policy this sale ought not to stand.

Let us now consider, whether any thing has been done which prevents the plaintiff from laying his case before a Court of Equity. Taking the facts as they stand in proof, can any person doubt that there has been great misconduct both in the auctioneer and the trustees? It is impossible to separate them. The trustees employ a person to dispose of the estate, and to that person they afterwards sell it for 500*l.*, having in their hands the valuation of it at 577*l.*, and knowing (for it was incumbent upon them to know it) that the estate was sold without impeachment of waste, and that that circumstance had not been taken into the account in the valuation. Do they require the auctioneer to pay the money? No. Do they withhold the possession from him till he pays it? No. The estate is sold on the 7th of *February*, and on the 15th of *April* this purchaser is let into possession; and it is not till about a year afterwards that the trustees get the purchase money, and then it is paid without a shilling for interest, although the purchaser has been in the

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possession of the estate the whole time. Supposing that under these circumstances the plaintiff, or any person on his behalf, had complained of the transaction at the time of its completion,—can any one doubt but that it would have been overturned immediately?

But it is said the plaintiff acquiesced, and that he has bound himself by that acquiescence. I give all possible weight to that argument, because I do not know any thing more mischievous, in general cases, than to disturb a transaction of long standing. It is better, perhaps, that occasional injustice should be permitted than to run the risk of doing greater injustice by entering into the consideration of transactions which the distance of time may, perhaps, render incapable of a satisfactory explanation. But how does this case stand? Was the plaintiff *compos sui*? Was he a free agent? It is said he came over from the *Isle of Man* to execute the conveyance, when it was unnecessary for him to execute it at all. But does not that raise a suspicion that he was induced to do this in order to give a colour to the transaction? If it was not necessary that he should execute the deed,—why did the trustee write the letter which has been produced, telling him he would lose the 150*l*. a-year, which his creditors had agreed to allow him, unless he would execute the conveyance? I consider that letter of the trustees as an act of duress, and whether it was or was not necessary that he should execute the deed, I think he executed it under duress, and therefore so far from the circumstance of the plaintiff having executed the conveyance, being a confirmation of the transaction, I must consider it as a circumstance weighing very much against the defendant and the trustees.

Then we come to the great and indeed the only objection which has been urged, which is entitled to any weight, viz. the length of time which elapsed before the

bill was filed. The sale was completed in *April*, 1803, and the bill was not filed till *Trinity* Term, 1815. It is certainly a long period of time; and yet, if the question had been concerning the legal estate, the statute of Limitations would not have operated. But even if the consideration of this question, as applied to a legal right, had been barred, although a Court of Equity looks to the statute of Limitations as a salutary rule, it is not bound by it, except in a very few cases, and certainly not in the present. But let us see what the situation of the plaintiff was during the period which elapsed previously to the bill being filed. It is obvious, that he continued in the *Isle of Man* under the same circumstances of distress that drove him thither, and that they were such as to prevent his returning to this country until the year 1813. Can it then be said, that a party who was in such distress prior to the transaction in 1802, that he was obliged to leave the country, and continues in consequence of that distress to live out of the kingdom, so that he cannot make his appearance till 1813? Can it be said that he is to lose his right to have justice done him in a Court of Equity?

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I am therefore of opinion, that the plaintiff has made out the case stated in his bill; I am of opinion also, that upon principles of public policy the transaction cannot be supported. I will add to this, that besides the principles of public policy there are in this case circumstances which not only mark it as a fit one for the interference of a Court of Equity; but which strongly shew the wisdom upon which those principles are founded.

Under these circumstances, I declare that the sale to the defendant *Court* is void; but that the defendant is entitled to hold the estate as a security for what (if any thing) is due to him from the plaintiff. It must be referred to the Deputy Remembrancer to take an account of the

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rents and profits received by *Court*, and of his expenditure for lasting improvements and repairs. An account must also be taken of what is due to him for principal and interest upon the purchase money paid by him; and upon payment of what, if any thing, is due to him from the plaintiff, let him reconvey the estate. An enquiry must also be made into the quantity of timber cut, and of the application of it.

With respect to the costs. I am bound necessarily to give costs against the defendant *Court*: but with respect to the trustees, as nothing is prayed against them, I cannot decree costs against them. I shall however give them no costs.

DECREE, FEBRUARY 4, 1820.
—It is declared that the purchase by the defendant, *Richard Court*, of the life interest of the said plaintiff, *Edward Oliver*, in the estate and premises in the pleadings of this cause mentioned was, under all the circumstances of the case, improperly made by the said defendant, and ought to be set aside. And it is thereupon ordered, adjudged, and decreed by the Court, that the said purchase be, and the same is hereby set aside accordingly. And it is further ordered and decreed by the Court, that the conveyance of the said *Edward Oliver's* life interest in the said estate, made and executed by the said plaintiff,

and the said defendants, *Thomas Hill* and *Francis Rufford*, to the said defendant *Richard Court*, bearing date the 15th April, 1803, do stand as a security to the said defendant, *Richard Court*, for the payment of what (if any thing) shall appear to be coming due and owing to the said defendant, upon the balance of the accounts hereinafter directed. And it is further ordered, adjudged, and decreed by the Court, that it be, and it is hereby referred to *Abel Moysey*, Esq. the Deputy Remembrancer of this Court, to take an account of the principal money paid by the said defendant, *Richard Court*, for the purchase of the plaintiff's

life interest in the estate and premises beforementioned, and to compute interest upon such purchase money after the rate of 5 per cent. per annum from the time the same was paid by the said defendant. And it is further ordered and decreed by the Court, that it be, and it is hereby, referred to the said Deputy Remembrancer, to take an account of the rents, issues, and profits of the said estate, which have been received by the said defendant *Richard Court*, or by any other person or persons, by his order, or for his use, or on his account, or which without his wilful default or neglect might have been so received by him. And it is further ordered and decreed by the Court, that in taking the said account the said Deputy Remembrancer do charge the said defendant, *Richard Court*, with the amount of such, or so much of the fine or premium of 400*l.* in the pleadings mentioned to have been received by the said defendant *Richard Court*, from the defendant *William Stokes*, for or in respect of the lease of the said estate and premises in the pleadings mentioned, granted by the said defendant, *Richard Court*, to the said defendant *Stokes*, and that the

said Deputy Remembrancer do set an occupation rent upon the said estate and premises, during the time the said defendant *Court* shall appear to have occupied the said estate, and that he do charge the said defendant with such rent; and in taking the said account the said Deputy Remembrancer is to make annual rests. And it is further ordered and decreed by the Court, that what shall appear to be coming due and owing from the said defendant *Court*, on account of such rents and profits, and otherwise, as aforesaid, be applied in the first place in payment of the interest, and afterwards in reduction of the principal, of the said purchase money; and in taking the said accounts, the said Deputy Remembrancer is to make to all parties all just allowances, and particularly to the said defendant *Richard Court*, for all sums of money laid out and expended by the said defendant for all material repairs and lasting improvements (if any) made by him upon the estate and premises; and in case what shall appear to have been so laid out by the said defendant for material repairs and lasting improvements, shall not be a-

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tified by the rents and profits of the said estates, or the fine or premium received by the said defendant *Richard Court*, as aforesaid, it is ordered by the Court that the same be added by the said Deputy Remembrancer to the principal of the said purchase money, and carry interest until the same shall have been satisfied by the subsequent rents and profits of the said estate; and it is further ordered and decreed by the Court, that upon payment by the said plaintiff *Edward Oliver*, of what (if any thing) the said Deputy Remembrancer shall report to be due to the said defendant *Richard Court*, upon the balance of the accounts hereinbefore directed, that the said defendant *Richard Court* do reconvey the said estate and premises to the said *Edward Oliver*, or as he shall direct, free from all incumbrances, made, done, and suffered by the said defendant. And it is further ordered by the Court, that the defendant *George Waldren* do join in such conveyance, and that the same be settled by the said Deputy Remembrancer, in case the parties shall differ about the same. And it is further ordered and decreed by the

Court, that it be, and it is also hereby referred to the said Deputy Remembrancer, to take an account of all timber, or other trees felled or cut down by the said defendant *Richard Court*, or by his servants or agents, upon and from off the said estate and premises, and how the same have been applied and disposed of, and also to take an account of all waste, if any, wilfully done, or committed or suffered to be done, or committed upon the said premises, by the said defendant *Richard Court*, or by any other person or persons claiming under him, and to set a value upon such timber and waste (if any) committed by the said defendant as aforesaid, and charge the said defendant *Richard Court*, therewith; and in taking the several accounts hereby directed, the said Deputy Remembrancer is to make to all parties all just allowances, &c. And it is further ordered, adjudged, and decreed by the Court, that it be, and it is hereby referred to the said Deputy Remembrancer to tax the said plaintiffs their costs of this suit to the hearing of this cause, which costs, when taxed, are to be paid by the said defendant *Richard Court*

to the said plaintiffs, their solicitor, or clerk in Court. And it is hereby further ordered and decreed by the Court, that the said plaintiffs' bill be, and the same is hereby

dismissed, as against the said defendants *Thomas Hill* and *Francis Rufford*: but the Court doth not think proper to give the said last named defendants their costs of this suit.

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HOUSE OF LORDS.

April 18, 21

25.

June 2, 9, 10,

11.

NOEL v. Lord HENLEY. (a)

A testator in his lifetime mortgaged certain estates to secure a sum borrowed for the purpose of paying portions charged upon the same estates by the marriage settlement of his father, under whose will the testator claimed. *Held* this was

not the personal debt of the testator, and therefore where the testator had devised other estates to be sold, and the produce applied *inter alia*, to discharge the mortgage debt in exoneration of

the mortgaged property, and gave the residue to the respondents, and bequeathed his personal estate to his wife, who died in his lifetime; it was held that the mortgage debt was, notwithstanding the failure of the bequest to the wife, to be paid out of the produce of the real estate directed to be sold.

One of the sums directed to be paid out of the produce of the estate directed to be sold, was a sum of 5,000*l.* in satisfaction of a similar sum settled upon the wife in the event of her surviving her husband; and it was held that this sum, sunk for the benefit of the persons entitled to the residue of money arising from the sale, was not a resulting trust for the heir.

THIS case came on upon an appeal from the decree of the Lord Chief Baron of the 10th of *May*, 1819, in consequence of the declaration contained respecting the mortgage debt of 20,000*l.* and interest, to Lady *Robert Manners*, and the 5,000*l.* by the will directed to be paid to the testator's late wife.

The appellants were Sir *Ralph* and Lady *Noel*, and the Honourable *Nathaniel Curzon*, and Lord and Lady *Tamworth*, as the next of kin of the testator; and the grounds of the appeal as stated in the printed cases of the appellants were,—

1. With respect to the mortgage debt of 20,000*l.* and interest, to Lady *Robert Manners*; it was contended that the same was, according to the true construction of the will, made payable out of the monies to arise from the sale of the real estates devised in trust to sell as aforesaid, in exoneration of the testator's personal estate.

2. With respect to the 5,000*l.* by the will directed to be paid to the testator's wife, Lady *Wentworth*, the ap-

pellant alleged that there was a resulting trust thereof for the appellants, Lady *Noel* and *Nathaniel Curzon*, as the testator's co-heirs, in consequence of the testator's wife having died in the testator's lifetime.

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Lastly, They insisted that nothing more was given to the persons entitled to the residue of the monies to arise from the sale of the said real estates, than so much as should remain of those monies after making the several payments thereout directed to be made: and amongst such payments, the mortgage debt to Lady *Manners*, and the 5,000*l.* to the testator's wife.

The respondents, on the other hand, submitted that the decree respecting the 20,000*l.* and 5,000*l.* was right, and ought to be affirmed for the following reasons:—

1. With respect to the mortgage debt of 20,000*l.* and interest to Lady *Robert Manners*, they contended that, according to the true construction of the will, the monies to arise from the sale of the real estates devised in trust to sell were not intended by the testator to be applied in the payment of such mortgage debt in exoneration of his personal estate: but that, if such exoneration was in any case intended, it was intended only in favour, or for the benefit, of the testator's wife Lady *Wentworth*, as the testator's residuary legatee, and not generally in exoneration of his personal estate. And as the testator's wife died in his lifetime, and therefore could not take the benefit so intended to her, such benefit should not be intended to the appellants, the next of kin of the testator, who were not in the testator's contemplation as the objects of his bounty.

2. With respect to the 5,000*l.*, by the will directed to be paid to the testator's wife Lady *Wentworth*, the

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purposes for which it was to be paid being expressly declared, in the will, to be in part payment of a contingent debt, which debt never had (and never could) become due, the sum to be paid in part satisfaction of it ought not to be raised at all.

The decree of the Lord Chief Baron having been made on the supposition that the debt of 20,000*l.* to Lady *Robert Manners* was the personal debt of the testator, and the judgment of the House of Lords reversing that part of the decree having proceeded upon the ground that it was not Lord *Wentworth's* own debt, it becomes necessary to state more fully the circumstances under which that debt arose.

By the marriage settlement of *Edward Lord Wentworth*, the father of the testator *Thomas Lord Wentworth* bearing date the 18th and 19th days of *July*, 1744, a term of 500 years in the devised estates in the counties of *Leicester* and *Warwick* was created and vested in trustees, upon trust for raising thereout the sum of 8,000*l.* for the portions of the younger children of the marriage, of whom there were three, *viz. Judith, Elizabeth, and Sophia.*

The same *Edward Lord Wentworth* by his will, dated 13th *January*, 1774, gave to every of his said three daughters *Judith, Elizabeth, and Sophia*, the sum of 5,000*l.* over and above the provisions made for them by his marriage settlement. He also gave some other legacies; and charged his personal estate, and in aid thereof his real estates, with the payment of the said legacies. He gave all his real and personal estates so charged to his son the testator *Thomas Lord Wentworth*, his heirs, executors and administrators, and appointed him sole executor.

Edward Lord Wentworth died in the year 1775, where-

upon the testator *Thomas Lord Wentworth* succeeded to the estates in the counties of *Leicester* and *Warwick*, subject absolutely to the payment of the 8,000*l.*; and, in aid of his father's personal estate, subject to the three legacies of 5,000*l.* each, and the other legacies given by his father's will. The personal estate of *Edward Lord Wentworth* was insufficient for the payment of his debts.

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By indentures of lease and release bearing date the 9th and 10th days of *October*, 1776; and made between the testator *Thomas Lord Wentworth* of the one part and *Joseph Boulbee* of the other part, *Thomas Lord Wentworth* conveyed to Mr. *Boulbee* the *Leicestershire* and *Warwickshire* estates in mortgage for 15,000*l.*; and by an indenture of assignment bearing date the 29th day of *September*, 1777, the surviving trustee of the term of five hundred years assigned that term to a trustee for Mr. *Boulbee* for better securing the mortgage money.

By another indenture of mortgage bearing date the 10th day of *Oct.*, 1777, the testator *Thomas Lord Wentworth* mortgaged the same estates to Mr. *Boulbee* for the further sum of 5,000*l.* These two mortgages for 15,000*l.* and 5,000*l.* were created by the testator; and the sums secured were borrowed to enable him to discharge and pay off the 8,000*l.*, the three legacies of 5,000*l.* each, and the other legacies charged on the estates. The money raised was applied in paying off the same in the years 1776 and 1777, and *Judith Noel*, *Elizabeth Noel*, and *Sophia Noel*, accordingly in those years executed and gave to their brother the testator *Thomas Lord Wentworth* releases and discharges for their respective proportions of the sum of 8,000*l.*, and for their said legacies of 5,000*l.* each.

By indentures of lease and release bearing date the

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10th and 11th days of *September*, 1792, the mortgage debts or sums of 15,000*l.* and 5,000*l.* were transferred by the heir at law devisee and executor of *Joseph Boulbee* to Lady *Robert Manners*, and formed the principal sum of 20,000*l.* in the will of the testator *Thomas Lord Wentworth* stated to be due and owing to her on mortgage.

Mr. *Shadwell* and Mr. *Lovatt*, for the appellants.

Mr. *Martin* and Mr. *Newland*, for the respondents.

June 9.

Lord *Redesdale*.

The question in this case arises upon the dispositions contained in the will of Lord *Wentworth*, and the decree which has been pronounced by the Court of Exchequer upon a suit instituted with respect to those dispositions.

Lord *Wentworth* had two estates, one which may be called the *Leicestershire* or the *Wentworth* estate, and the other the *Rowney* estate. The first he was entitled to from his father, the other under a settlement as heir at law of Mr. *Rowney*; and the disposition he made by his will was, to settle all his real estates, except the estate which he took under the settlement as heir at law of Mr. *Rowney*, upon certain trusts which it is not necessary now to state. With respect to the *Rowney* estate he disposed of that in this way:—he gave it to trustees in trust to sell and convert into money: the consequence of which was that he made that estate no longer real but personal estate, by the conversion of it into money; and then he directed the application of that money.

The first application which he directed was, that the money to be raised by the sale of the *Rowney* estate should be employed in exonerating his *Leicestershire* estate from certain mortgages which were then subsisting

upon them. With respect to one of those mortgages no question is raised, whether it is or is not to be paid out of the money to be raised by the *Rowney* estate: but, with respect to the second, a mortgage of 20,000*l.*, it has been contended that the money to arise by the sale of the *Rowney* estate is not to be applied in the payment of that charge in case the personal estate of Lord *Wentworth* is equal to the payment of it, or if applied, it is to be applied so far only as that personal estate may be deficient. This is contended for on the part of the persons who claim the benefit of the disposition made of the residue of the money to arise from the sale of the *Rowney* estate. The appellants, who are the heirs at law and next of kin, on the other hand, contend that this mortgage ought to be paid out of the proceeds of the *Rowney* estate: but Lady *Noel* and Mr. *Curzon*, who are heirs at law as well as next of kin, and as such entitled to any part of the real estate which may be undisposed of, insist also that if there is any right to discharge this mortgage out of the personal estate, then that they, as heirs at law, are entitled to the benefit of the 20,000*l.* out of the proceeds of the sale of the *Rowney* estate; and not the persons to whom the residue of the money to arise by the *Rowney* estate has been bequeathed.

The decree which has been made has been founded first upon the idea that the 20,000*l.* was a debt upon the personal estate of Lord *Wentworth*, as well as upon his *Leicestershire* estate; and therefore it has declared that, the personal estate ought to be applied in payment of that debt, and not the money to be raised out of the *Rowney* estate; and because the personal estate was sufficient, the Court has determined that the persons who claimed the benefit of the money to arise by the sale of the *Rowney* estate should be benefited by that construction. But, looking at the will of Lord *Wentworth* with respect to the disposition of the *Rowney* estate, it seems to me perfectly

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clear that the persons who claim the benefit of the money to arise by the sale of the *Rowney* estate can have no claim whatever to this sum of 20,000*l.*; for the disposition which he makes by his will is this:—he directs the whole of the *Rowney* estate to be sold, and the money to be applied, first, in payment of a trust charge by way of mortgage on the *Leicestershire* estate in respect of which no question is made by either party. He then, in the same language, directs the 20,000*l.* charge to be paid in the same way, and all interest due at the time of his death, and all expenses that should be incurred in removing the charge from the *Leicestershire* estate; and then he gives certain sums of money to various persons, and particularly the sum of 5,000*l.*, to his wife; and, after those deductions, he gives the remaining money upon the trusts expressed in his will concerning that property. Now the person claiming this 5,000*l.* can claim nothing but what is given by this will. That sum of 5,000*l.* is given by way of legacy to Lady *Wentworth* in part satisfaction of a certain demand which she would have against Lord *Wentworth* out of her property, if he had not made that disposition, and she had survived him. Now if any property is given by a will in the nature of a legacy to a person in being at the time the will is made, but who dies before the testator, that legacy of course becomes lapsed, and no longer payable. That is a contingency to which every person, who makes a disposition by will, must be deemed to know that such a disposition is subject; and, although it is contended on the part of the heirs at law, that this 5,000*l.* arising out of the sale of the *Rowney* estate should be applied for their benefit as so much real estate undisposed of by the will, I conceive that that is not the true construction of the will; because, having given that 5,000*l.* in the shape of a legacy which in its nature must be subject to that species of contingency, that contingency is one which he must be supposed to have looked to for the benefit of those persons to whom

he gave the residue of the money to arise by sale of the *Rowney* estate; and, therefore, it seems to me that the decree is perfectly right in the manner in which it has disposed of that question, by holding that that 5,000*l.* is not to be raised out of the money which may be raised by sale of the real estate inasmuch as that contingency has happened to which the testator is supposed to have looked at the time he made his will.

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With respect to the 20,000*l.*, however, it is directly the reverse. That 20,000*l.* was a debt existing upon his *Leicestershire* estate, a debt which was certainly subject to no contingency; and, therefore, when he directed the 20,000*l.* to be taken out of the money to be raised by sale of the *Rowney* estate, he must have intended that those who are to take the residue of the money arising from the *Rowney* estate should take such residue subject to the payment of that sum of 20,000*l.* I think, therefore, that there really is no question properly between the persons who are entitled to the surplus of the money under his will arising from the sale of the *Rowney* estate, and the persons who are entitled, as his next of kin, to his personal estate. The decree has treated the 20,000*l.* as a debt affecting the personal estate of Lord *Wentworth*; and, upon the supposition that the personal and real estate are both chargeable with the payment of it, has directed that the personal estate shall be first applied. This is founded upon certain rules which have been long established in the Courts of Equity, which are commonly called rules for marshalling of assets, that is, for applying the real and personal property of a person dying intestate or testate in payment of his debts according to a certain order established by those rules. And certainly, although a debt is particularly charged on real estate, yet if it is a personal debt of a testator, or of a person dying intestate, it is perfectly clear that according to the course of established rules the debt, though charged by way of mortgage on

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the party contracting it, it is to be taken in the first place out of the personal estate.

the real estate, is to be taken in the first place out of the personal estate if the personal estate will extend to the payment, or so far as it will extend. But this has always been considered as a right existing on the behalf of the person, whether devisee or heir at law, who may claim the real estate. A right in that person to insist upon having the personal estate so applied. The first question, therefore, in that view of the case which would arise here, between the persons entitled to the *Leicestershire* estate, upon which it was originally charged by way of mortgage, and the persons entitled as the next of kin or residuary legatees to the personal estate, is whether the 20,000*l.* was under the circumstances to be considered as the personal debt of the testator?

A creditor may have a right to demand a debt against the personal estate, which the heir at law or devisee of the real estate may not have a right to require to be paid out of the personalty in exoneration of the real estate.

If a real estate comes to a man subject to a mortgage, and upon a transfer of that mortgage the person taking the estate covenants for the payment of the mortgage money that is not a debt payable out

Looking at the original constitution of the debt itself, I think a great doubt might be raised whether it ever was a debt upon the personal estate of the testator; I mean a debt which any person but a creditor had a right to demand against the personal estate; for a creditor may have a right to demand a debt against the personal estate which the heir at law or devisee of the real estate may not have a right to require to be paid out of the personal estate in exoneration of the real estate. Thus, for instance, if a real estate comes to a man subject to a mortgage, and upon transfer of that mortgage that person covenants for payment of the mortgage money, that is not a debt which is to be paid out of the personal estate in exoneration of his real estate for the benefit of the heir at law, because the debt was not originally his debt; and I think a great question might be raised in this case whether the 20,000*l.* charged upon the *Leicestershire* estate ought to be considered, at least with respect to a considerable part of it, as a debt which was originally the debt of Lord *Wentworth* in the sense in which those words are commonly understood. But I think it is scarcely necessary to agitate that question, because Lord *Wentworth* upon his marriage made a settlement of the

Leicestershire estate, which was then subject to this mortgage; and in that settlement he cautiously provided that the persons claiming the *Leicestershire* estate under it should not have a right to call upon him for payment of this debt. Anxious words are used in that settlement, the effect of which would certainly be that no person claiming under it would require him to pay out of his other property, whatever it might be, that mortgage: but must take subject to this mortgage. All the limitations in that settlement, however, terminated with his death, because Lady *Wentworth* died before him, and there was no issue of the marriage; and, therefore, he had full power to dispose of the *Leicestershire* estate; and, if he had made no disposition, it would have descended to his heirs at law.

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of the personalty in exoneration of the real estate for the benefit of the next of kin.

This was felt in the argument on the part of the respondents; and they contended that inasmuch as all the limitations contained in the settlement were at an end, the question was between the persons who might claim as heirs at law of Lord *Wentworth*, if he had died intestate as to the *Leicestershire* estate and possibly his devisees, if he had disposed of it, and his next of kin, and the persons who might be entitled under the settlement to his personal estate. But I confess it strikes me that it would be dangerous to hold that the question could be so framed, because the consequence would be that it might for a century be uncertain whether the personal estate of a person standing in the same situation as that in which Lord *Wentworth* stood was or was not to be liable to the payment of such a demand. For if Lord *Wentworth* had left issue, and the issue had for a century been in the possession of this *Leicestershire* estate without having barred the remainder to the right heirs of Lord *Wentworth*, and then the right heirs had become entitled to the estate at the distance of a century, the personal estate, if not dissipated, which it might be in the

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and out of no other fund, if the produce of the *Rowney* estate should be sufficient for that purpose.

But it is contended that this was intended only for the benefit of Lady *Wentworth* in case she had survived him, that she might enjoy all the benefits he had given to her by his will; and, amongst others, the residue of his personal estate. This may have been in his view: but I do not see that it was exclusively so. He appears, however, to have had in view that Lady *Wentworth* might refuse the dispositions contained in his will, and insist upon the terms of his settlement by which she was entitled to very considerable sums of money; and he, therefore, made a provision in his will for the purpose of preventing any dispute in his family upon that subject by giving her an ample compensation for whatever she might be entitled to. But he has so expressly declared his intention that the *Leicestershire* estate should be exonerated from this 20,000*l.*, and all interest which should have accrued at the time of his death, and all costs, charges, and expenses which might arise by freeing the *Leicestershire* estate from that burthen, and that it should be repaid out of the money to arise by sale of the *Rowney* estate, that I think it is impossible to suppose that he had it in contemplation that this debt should be paid out of any other fund, provided that fund should be sufficient for the purpose, his intention was that as far as that fund should be sufficient for the purpose that should be the fund applied. It was probably not in his contemplation at the time that it would not be sufficient for the purpose; and I apprehend the fund is not only sufficient for the purpose, but is very ample.

Under these circumstances it appears to me that the decree ought to be affirmed so far as relates to the sum of 5,000*l.* given by way of legacy to Lady *Wentworth*, because that sum was given as a legacy, and therefore must be supposed to be intended by the testator to be

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given subject to all possibilities which might happen; and, among others, the death of the legatee in the lifetime of the testator. But this 20,000*l.* was given subject to no contingency. It was a debt demandable out of his *Leicestershire* estate; demandable, unquestionably, by the creditor out of his personal estate; but a debt which he himself had in his lifetime anxiously provided in his marriage settlement that the persons claiming the *Leicestershire* estate under that marriage settlement should not be at liberty to demand against him. I therefore conceive that the decree in this respect ought to be varied; and that it ought to be declared that that mortgage of 20,000*l.* affecting the *Leicestershire* estate with all interest due at the death of Lord *Wentworth*, and which has since accrued, and all costs, charges, and expenses attending the exoneration of the *Leicestershire* estate from that mortgage, should be paid out of the produce of the *Rowney* estate.

The LORD CHANCELLOR,

June 10.

(After stating the will) the bill was filed in this case by the persons entitled to the monies to arise from the sale of the real estates which the testator had directed to be sold, praying that the will might be established, and the trusts carried into execution; and contending that as the wife of Lord *Wentworth* happened to die in his lifetime, his personal estate was applicable to the payment of all the debts which had been made payable out of the produce of the real estate.

The Court was of opinion, first, that the 5,000*l.* was not payable at all; and, secondly, that the 20,000*l.* was to be paid out of the personal estate. And the principal question now before the House is whether the 20,000*l.* is to be paid out of the personal estate. Upon the general rule of law there can be no difficulty in stating that if a

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Where a man takes an estate subject to a mortgage, and upon a transfer of that mortgage covenants for payment of the mortgage money, the covenant will be considered only as a collateral security, and the personal estate will not be applicable in the first instance, and although the original mortgage bore interest at 4 *per cent.*, and upon the transfer, it be raised to 5 *per cent.*, the additional 1 *per cent.* will not be a charge upon the personality.

man makes a mortgage in the ordinary terms in which mortgages are made, he makes his real estates merely a pledge for the debt; and his personal estate would be first applicable to the payment of his mortgage debt in case of his real estate. And if he were by his will simply to devise his mortgaged estate, without saying more, a court of equity has said he could not give otherwise than subject to the mortgage; and, therefore, his saying "subject to the mortgage" shall make no difference as to the application of the real and personal estate. But if a grandfather makes a mortgage, and the estate comes afterwards to the son of the grandfather for life, with remainder to his first and other sons in tail, and the mortgagee calls in his money (in which case there must be a transfer of the mortgage;) although the father must join in the transfer of that mortgage, and would be called upon in all probability to covenant for the payment of the money, yet as between his real estate and personality, the real estate not having been originally his own, the Court would only consider his covenant a collateral security, and his personal estate would not be applicable to the payment of the mortgage debt. And Lord Thurlow has said very generally, that although a mortgage bore interest at four *per cent.*, which upon the transfer was raised to five *per cent.*, yet the additional one *per cent.* was not a charge upon the personality.

It may also be stated to your Lordships that the mere bequest of personal estate to a person will not exonerate that personal estate so bequeathed from a liability to exonerate the real estate in a case where, if the party had died intestate, the personal estate would be liable; it would seem, therefore, to follow of course, that in order to exonerate the personal estate, it must have been clear upon the face of the will that the personal estate was not meant to be so applied, but given to another. Then if the gift to that other failed, the personal estate would not be

given at all; and there are cases which say that where a gift of personal estate fails, being undisposed of, it shall be applied as if it had not been given at all: but all those cases must be looked to according to their circumstances. I have, therefore, looked into the marriage settlement referred to by the will, because the obligations as to Lord *Wentworth's* personal and real estate arise out of that marriage settlement; and I find, that the father of Lord *Wentworth* had charged his *Warwickshire* estate with portions for his younger children, there being three, of 5,000*l.* each; and these *Warwickshire* estates became the property of Lord *Wentworth*, subject to those charges. And I apprehend if nothing had been done by him, but he had died leaving the real estate to descend subject to those charges to others after him, at the death of his father, this must have been considered as a debt of the estate, not a debt of the late Lord; except so far as he might have possessed personal estate, in respect of which he might have been liable. He afterwards raises money, and executes instruments, which appear to be nothing more than ordinary mortgages for the repayment of the money which he had raised in order to enable him to pay off those charges. After that he marries the late Lady *Wentworth*; and upon that marriage a settlement is made, which takes notice of the circumstance that the estates were subject to those mortgages. And then it goes on to settle the estate in this way: after providing for what is to be done with the money which the lady brought into the family, the estates in *Leicestershire* and *Warwick* are settled to himself for life, subject to the mortgages in question. They are settled to him after a provision for pin-money, and a provision for her in case she survives him. They are then settled upon the first and other sons of the marriage, subject to those mortgages; and the final use is to his right heirs—then his *Leicestershire* and *Warwickshire* estates being

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thus settled, and the different branches of those who should succeed him being all of them pointed out, the words "taking subject" being expressly repeated in the creation of every use and limitation which is to be found in this settlement from the beginning to the end, he then makes his will. And, making his will,—what does he do? Why, conceiving it would be an advantage to the family estates in *Leicestershire* and *Warwickshire*, he directs that the other estate (the *Rowney* estate) should be sold, and out of the money arising from the sale, first 2,000*l.* is to be paid to *Haworth*, which was not a mortgage of his own; he then directs the 5,000*l.* to be paid, which was only to be payable upon a contingency; and that not having happened, no direction is given, the will having failed with reference to that part of it. Then he directs the sum of 20,000*l.* to be raised out of the estates he had devised to be sold to be applied in payment of those mortgages which had so affected the *Leicestershire* and *Warwickshire* estates; and after all those payments have been made, and after his other debts have been paid so far as his personal estate would pay his other debts, he directs the residue of the money to be reconverted into land, but which might never be converted into land, to be enjoyed in moieties to those persons who are to take by virtue of the testamentary words "that money."

The first question one asks is as to this 20,000*l.*; and it struck me very early in the argument that in order to construe this will which refers over and over again to this marriage settlement, we must see what the effect of it is, upon this fund upon which this question has arisen. Now I should be glad to ask any one this question. Lord *Wentworth* has died without any issue that would take under the limitations of that settlement: but, having so died, the case might have been just the reverse. He might have had ten sons. Could they have been said

to take under this marriage settlement when it is exonerated of the interest in these mortgages when all the covenants for title throughout except them?

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In order to decide this case, we must look to the joint effect of the marriage settlement and the will. The testator having joined them you cannot look at them separately. You must look at their combined effect in order to determine whether this is a case which falls within the application of those rules of equity in which it has been established in certain cases that the personal estate shall be applied towards the discharge of an incumbrance upon the real estate. I see, in both the reports of this case that the Lord Chief Baron treats this as the personal debt of Lord *Wentworth*. That in one sense it was his personal debt no man can deny, when he mortgaged his estate, and gave his bond, and entered into contracts for the payment of the money. It was his debt as between him and his creditors: but whether it was his debt as between them and his representatives is quite a different question; for, to determine it to be his debt as to the creditors, determines nothing as to a great many cases that may be put, whether it is a debt as to the persons claiming under him. And, as far as I can judge upon these cases, the effect of the marriage settlement was not brought before the Court of Exchequer; and, therefore, the very instrument upon which the whole case seems to me to hinge was not under consideration when it gave this judgment; consequently I must take the liberty of saying that though the decision of my Lord Chief Baron who decided the case might be very right upon the case before him, yet your Lordships may not be able to confirm it.

It is upon these grounds, without entering into the various cases that have been cited, that it does appear to me that the 20,000*l.* is a sum which must be raised out of

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the estate directed to be sold. The proceeds of that estate must be applied as this testator meant they should be applied in exoneration of the mortgages upon the *Leicestershire* and *Warwickshire* estates. This case has already been stated by a noble and learned lord; and I think that for the reasons which have been given by him, if not for those given by me, the judgment in this respect must be set right.

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1. Parol evidence of uninterrupted

payment as far back as living memory could reach of a modus of 8d. per acre in lieu of tithe hay, not rebutted by terriers stating the vicar to be entitled to tithe hay, or a modus of 8d. per acre in lieu thereof. *Drake v. Smith and Others.* Page 104

2. Parol evidence as far back as living memory could reach of the uninterrupted payment of a sum of 5s. by the occupiers of land in a certain district, in lieu of the tithe of hay throughout such district, rebutted by terriers stating the 5s. to be payable in lieu of hay grown in *crofts* only. *Ibid.*
3. The same species of parol evidence of payments in lieu of a variety of other articles rebutted by terriers in which those articles are mentioned as belonging to the vicar. *Ibid.*

EXCHEQUER.

See CHARITY 1.

EXEMPTION.

See TITHES 3.

EXTENT.

See CROWN 1.

EXTRA-PAROCHIAL PLACES.

See TITHES 23.

F.

FINE.

See TITHES 4.

FOALS.

See MODUS 3.

FRAUD.

1. A person executing a deed for the purpose of defrauding the law, cannot come into equity for the purpose of setting it aside, even though the instrument has never been made use of: and, therefore, if *A.* convey an estate to *B.* as a qualification to kill game, equity will not compel a reconveyance. *Roberts v. Roberts.* Page 143
2. See VENDOR AND VENDEE 2.
3. See PARTNERSHIP.
4. See AUCTIONEER 1.

G.

GARDENS.

See ENDOWMENT 1.

GENERAL WORDS.

See TITHES 24.

GEESE.

See TITHES 13.

GRANT OF TITHES.

See COMPOSITION REAL 1.

GRASSES.

See TITHES 22.

GUARDIANS OF THE POOR.

See LEGACY 2.

H.

HEARING.

See ADMISSIONS.
See AMENDED BILL.
See PLEADING 1.

HEIFER.

See TITHES 9.

HEIR AT LAW.

See MARSHALLING ASSETS 1.

HEREDITAMENTS.

See TITHES 24.

HISTORY, LOCAL.

See MORTMAIN 1.

HUGO WELLS.

Book of endowment of *Hugo Wells*, Bishop of *Lincoln*, received as evidence. *Leonard v. Franklyn.* Page 34

I.

IMPROPRIATOR.

An impropiator is not a necessary party to a bill by a vicar against occupiers; and if made one, he may demur. Bill dismissed against him, but under circumstances without costs. *Williamson v. Lord Lonsdale and Others.* 171

INJUNCTION.

Injunction to stay trial upon merits confessed in the answer, granted at the sittings, although the notice of motion was only served on the day before, there being only one day of sitting. *Hayward v. Greenwood and Others.* 209

INSCRIPTION.

See MORTMAIN 1.

INTEREST.

1. *See* BOND 1.
2. *See* LEGACY 1.

INTERPLEADER.

1. An auctioneer is the agent as well of the purchaser as of the vendor: and if the vendor commences an action against him for the recovery of the deposit, he may file a bill of interpleader, for the purpose of ascertaining to whom it belongs. *Fairbrother v. Prattent and Another.* Page 64
2. The Court will order the defendants to interplead, although one of them has not appeared to the bill, provided the usual process of contempt has been gone through. *Ibid.*

ISSUE.

The Court will not direct an issue in favour of a rector where a defendant sets up an opposite title which he proves to the satisfaction of the Court. *Wilmot v. Kellaby and Others.* 116

J.

JUDGMENT.

See NOTICE 1.

K.

KING.

See TITHES 23.

L.

LAMBS.

1. *See* MODUS 2.
2. *See* TITHES 11.

LAPSE.

1. *See* RESIDUE 1.
2. *See* MARSHALLING ASSETS 1.

LEGACY.

1. Legacies charged on a reversion directed to be raised by sale or mortgage, and declared to carry interest from the death of the testator, it not appearing from the will that the estate charged was a reversion. *Davies v. Davies and Others.* Page 84
2. Bequest of money to trustees to pay the interest and dividend to the poor of a certain parish; held not within the meaning of a local act of parliament, which vested all estates and monies held in trust for the benefit of the poor of the parish, and not otherwise, specifically appropriated in the guardians of the poor in that parish. *Attorney-General v. Freeman and Others.* 117
3. *See* RESIDUE 1.

LENGTH OF TIME.

See AUCTIONEER 1.

LINCOLN, BISHOP OF.

See HUGO WELLS.

LONDON.

See TITHES 4.

M.

MARKET-HOUSE.

See CHARITY 2.

MARSHALLING ASSETS.

1. A testator in his lifetime mortgaged certain estates to secure a sum borrowed for the purpose of paying portions charged upon the same estates by the marriage settlement of his father, under whose will the testator claimed; *held*, that this was not the personal debt of the testator; and, therefore, where the testator had devised other estates to be sold, and the produce applied *inter alia* to discharge the mortgage debt in exoneration of the mortgaged property, and gave the residue to the respondents, and bequeathed his personal estate to his wife, who died in his lifetime, it was held that the mortgage debt was, notwithstanding the failure of the bequest to the wife, to be paid out of the produce of the real estate directed to be sold. *Noel v. Lord Henley.* Page 322
2. One of the sums directed to be paid out of the produce of the estate directed to be sold, was a sum of 5,000*l.* in satisfaction of a similar sum settled upon the wife in the event of her surviving her husband, it was held that this sum sunk for the benefit of the persons entitled to the residue of money arising from the sale, and was not a resulting trust for the heir. *Ibid.*
3. Although a debt is particularly charged upon the real estate, yet if it be the personal debt of the

party contracting it, it is to be taken in the first place out of the personal estate. *Noel v. Lord Henley.* Page 329

4. A creditor may have a right to demand a debt against the personal estate which the heir at law or devisee of the real estate may not have a right to require to be paid out of the personalty in exoneration of the real estate. *Ibid.* 330
5. If a real estate comes to a man subject to a mortgage, and upon a transfer of that mortgage the person taking the estate covenants for the payment of the mortgage money, that is not a debt payable out of the personalty in exoneration of the real estate for the benefit of the next of kin. *Ibid.*
6. Where a man takes an estate subject to a mortgage, and upon a transfer of that mortgage, covenants for payment of the mortgage money, the covenant will be considered as a collateral security only, and the personal estate will not be applicable in the first instance; and although the original mortgage bore interest at 4 *per cent.*, and upon the transfer it be raised to 5 *per cent.*, the additional 1 *per cent.* will not be a charge upon the personalty. *Ibid.* 336

METES AND BOUNDS.

See TITHES 3.

MILCH COWS.

1. *See* MODUS 1.
2. *See* TITHES 8.

MILK.

See TITHES 9.

MODUS.

1. Modus of a penny for milch cows *summered* on lands within a parish disallowed, because of the uncertainty of the word *summered*. *Rumney v. Beale and Others.* Page 35
2. Modus of 3d. for a lamb, not too rank to be sent to a jury. *Drake v. Smith and Others.* 113
3. Modus of a penny for every foal, good. *Jenkinson v. Royston and Others.* 127
4. A bill to establish a modus should be filed by certain owners and occupiers of land within the parish, on behalf of themselves, of all other owners, occupiers, &c. and the ordinary should always be a party. *Hales v. Pomfret. Pomfret v. Hales.* 142
5. See TITHES 3, 5, 6, 9, 17, 19.
6. See EVIDENCE, PAROL 1, 2, 3.
7. See PARTIES 1.

MORTGAGE.

See COSTS.

MORTMAIN.

1. Bequest of stock to be laid out in rebuilding almshouses. The fact that almshouses were in mortmain before the 9 Geo. 2. c. 36. proved by an old inscription, and an extract from a local history. *Shaw v. Pickthall and Others.* 92
2. See CHARITY 4.

N.

NIL.

See TITHES 25.

NOTICE.

1. Notice of a judgment against a vendor is sufficient notice to put a purchaser upon making further enquiry. And if he neglect it, and it afterwards appear that instead of a judgment the party has a specific incumbrance on the property, he will be bound by it. *Taylor v. Baker and Others.* Page 71
2. Costs decreed against a mortgagee under circumstances. *Ibid.*
3. See VENDOR and VENDEE 1.

NOTICE OF MOTION.

See INJUNCTION.

NULLUM TEMPUS ACT.

See TITHES 25.

O.

ORDINARY.

See MODUS 4.

P.

PARTIES.

1. The patron and ordinary are necessary parties to a bill to establish a modus; and therefore where the defendants insisted on several moduses and customs which were in themselves bad, but were established by a decree made in a suit in this Court, to which the patron and ordinary were not parties, the Court refused to allow them, and decreed an account. *Jenkinson v. Royston and Others.* 121
2. See TITHES 21.
3. See CHARITY 3.

PARTNERSHIP.

A. being an attorney, prevails upon *B.* to enter into partnership with him for the term of five years, for which he is to pay 1050*l.*, but before fourteen months are expired, *A.* sues out a commission of bankrupt against *B.*, which puts an end to the partnership; *held* a fraud on the part of *A.*; and he is decreed to pay part of the premium which had already been advanced, and to deliver up a bond given by *B.* for securing the remainder. *Hamil and Others v. Stokes and Others.* Page 20

PATRON AND ORDINARY.

See PARTIES 1.

PERSONAL ESTATE.

1. See RESIDUE 1.
2. See MARSHALLING ASSETS 1.

PETITION.

See CHARITY 3.

PIGS.

See TITHES 12.

PLEADING.

1. It is no objection at the hearing, to the manner of stating a modus in an answer that the defendant does not speak to his knowledge and belief. If the answer be not sufficient, it should be excepted to. *Williamson v. Lord Lonsdale and Others.* 58

2. See TITHES 3, 21.

3. See PARTIES 1.

4. See MODUS 4.

POTATOES.

1. See TITHES 2, 7.

POOR.

See LEGACY 2.

PRACTICE.

1. See INTERPLEADER 1, 2.
2. See ISSUE.
3. See AMENDED BILL.
4. See INJUNCTION.

PRINCIPAL AND SURETY.

The obligee and principal in a *replevin bond* without the knowledge of the surety, enter into an agreement for a reference of all matters in dispute between them to an arbitration; and afterwards the principal gives a *cognovit* acknowledging the obligee's right to distrain for the sum awarded, and authorizing judgment of *non pros* to be entered up in the ensuing Term, which was a Term later than that in which, according to the usual course, judgment might have been signed; *held* that the surety was discharged from his obligation. *Bowmaker v. Moore.* Page 264

Q.

QUALIFICATION TO KILL GAME.

See FRAUD 1:

R.

RANKNESS.

See MODUS 2.

RAPE SEED.*See* TITHES 15.**RECONVEYANCE.***See* FRAUD 1.**RECTOR.***See* ISSUE.**RENT.***See* TITHES 4.**REPLEVIN BOND.***See* PRINCIPAL AND SURETY.**RESIDUE.**

1. A testator devises a certain real estate to trustees, upon trust to sell, and out of the proceeds to pay debts which were particularly specified, and a legacy, and to pay the surplus, after paying so much of his other just debts and legacies as his personal estate would not extend to pay, to *A.* and *B.*, &c.; and afterwards gives his personal estate, after paying such of his just debts and legacies as were not otherwise provided for, to his wife. *Noel v. Lord Henley, Noel v. Strong.* Page 211
2. The wife died in the lifetime of the testator: and it was held that one of the debts specified, which was the testator's own debt, was payable out of the personal estate. *Ibid.*
3. *Secus* where one of the debts was not the proper debt of the testator, but of the person from whom he devised the estate in question, and was secured by mortgage on the estate. *Ibid.*

4. *Secus.* In the case of the legacy. *Noel v. Lord Henley, Noel v. Strong.* Page 211

5. *See* MARSHALLING ASSETS 1.**RESULTING TRUST.***See* MARSHALLING ASSETS 1.**REVERSION.***See* LEGACY 1.**REED GROUND.***See* TITHES 17.**S.****SITTINGS.***See* INJUNCTION.**SPECIFIC PERFORMANCE.**

1. Specific performance decreed of a contract for the purchase of a debt. *Wright and Others v. Bell* 95
2. *See* BANKRUPT 1.

STATUTE.

1. 32 *Hen.* 8. c. 7. *See* COMPOSITION REAL 1.
2. 37 *Hen.* 8. c. 12. *See* TITHES 4.
3. 9 *Geo.* 2. c. 36. *See* CHARITY 4.
4. 52 *Geo.* 3. c. 101. *See* CHARITY 1, 2.

SUMMERING.*See* MODUS 1.**SUPPLEMENTAL BILL.***See* BANKRUPT 1.**SUSTENANCE.***See* TITHES 22.

T.

TARES.

See TITHES 22.

TERRIER.

See EVIDENCE, PAROL 1.

TITHES.

1. The mere fact of payment from a period anterior to 13 *Eliz.* will not be sufficient to establish a composition real. The deed, or instrument by which it was made, must be produced, or some evidence given to shew that it has existed. *Bennett v. Skeffington.*

Page 10

2. The words *gardens, curtilages,* and *alterage* in an endowment, will not give a vicar the tithe of *potatoes* and *turnips*, or of any other article not known in *England* at the time. But where there appears to have been a general perception of all small tithes by the vicar, a subsequent endowment will be presumed of small tithes of every description, under which the rector will be entitled to these articles. *Williams v. Price and Others.*

13

3. Although it is not necessary in an answer to set out the metes and bounds of lands claimed to be exempted by reason of a modus, yet they must be described in such a manner that it may appear with certainty that the lands are in request, of which the exemption is claimed: and when the land in question is part of a larger portion

covered by a general modus, it is not sufficient to describe only the particular part, but the whole of the land over which the modus extends must be pointed out. *Gillebrand v. Scotson.* Page 27

4. Under the *37 Hen. 8. c. 12.* the payment of a large fine, provided it be attended by no diminution of the accustomed rent, is not fraudulent or covinous within the statute, and the *2s. 9d.* in the pound will be decreed upon the rent only. *Minor Canons of St. Paul's v. Crickett and Others.* 37

5. A modus of one penny for every occupier of land in tillage, in lieu of all predial tithes grown upon such land, is bad. *Williamson and Others v. Lord Lonsdale and Others.* 49

6. Although the tithe of agistment is of recent introduction, especially in the north of *England*, a modus of a certain sum of money in lieu of tithe of grass, whether mown or made into hay, or eaten by barren and unprofitable cattle, will cover the tithe of agistment. *Ibid.*

7. Potatoes and turnips consumed in the family of the grower are liable to tithe. *Ibid.*

8. Modus of two-pence for every milch cow, good. *Jenkinson v. Royston and Others.* 127

9. Modus of one penny for every heifer that hath had but one calf, in lieu of milk and all profits arising by such cow and heifer, except the calf, good. *Ibid.*

10. A custom that calves in kind are

to be delivered at the will of the owner, after they be three weeks old, and at such time of the year as the owner thinks best to spare them, not hindering his breed; and if the parson delay fetching, to pay for the keeping, bad. *Jenkinson v. Royston and Others.*

Page 128

11. A custom that tithe lambs should be delivered the first day of *May*, and that if any person have under seven lambs, he is to pay for every lamb a halfpenny: and if seven lambs and under ten, one lamb; and to be allowed for every lamb short of ten a halfpenny, and so likewise for any odd number: and that lambs falling after the 1st of *May* are to be kept until a month old, and if longer, the keeping to be paid for, bad for uncertainty. *Ibid.*

12. A custom that pigs should be delivered at the will of the owner after they be nine days old, and that if the parson delay the fetching thereof he should pay for the keeping, bad. *Ibid.* 129

13. A custom that geese should be delivered in kind before *Midsummer*, and that if any person have seven, he should pay a halfpenny for each, and that if seven and under ten he should be allowed for them that want of ten, one halfpenny each, and so for any odd number, good. *Ibid.*

14. A custom with respect to wool, that the parson should have the tenth stone or pound presently after clipping, and that any per-

son selling sheep out of the parish after *Candlemas-day* and before clipping, should nevertheless pay one penny for the wool, good. *Jenkinson v. Royston and Others.*

Page 130

15. A custom that of rape-seed the tenth bushel should be rendered ready dressed, the parson allowing for the dressing one penny per bushel: bad for uncertainty, it not being stated what was to be rendered for a less quantity than a bushel. *Ibid.*

16. *Query*, Whether a custom to render the tenth tree is a payment in kind for wood. *Ibid.*

17. Modus of one penny at *Easter* for every acre of reed ground, good. *Ibid.*

18. A custom to pay two eggs for every hen or duck, and for every cock or drake three eggs, in lieu of the tithe of eggs, bad. *Ibid.*

19. A vicar, by shewing a general right to the perception of tithes in kind, places himself in the situation of a rector, and throws it upon the occupier to prove the existence of moduses set up, and the lands to which they apply: and *semble*, that evidence of a general payment throughout the parish of so much in the pound in lieu of tithes, regulated according to the poor's rate or rack-rent, is sufficient evidence of a vicar's general right to tithes in kind. *Wright v. Southwood.* 137

20. Where a vicar succeeds in establishing a general right to all tithes, except those of corn and grain,

throughout a parish, it requires very strong evidence to shew that an impropiator of a particular district, who claims under a grant, limiting his title to the excepted articles, is entitled to the tithes of any other thing. *Williamson v. Lord Lonsdale and Others.*

Page 171

21. An impropiator is not a necessary party to a bill by a vicar against occupiers; and if made one, he may demur. Bill dismissed against him, but under circumstances, without costs. *Ibid.*
22. Clover, tares, and artificial grasses, cut green and given to cattle employed in husbandry, are liable to tithe if the occupier have sufficient *sustenance* of any other description for their maintenance. *Dorman and Others v. Currey and Others.* 194
23. The King in right of his Crown has a general right to the tithes of all lands situate in *extra-parochial* places. *Attorney-General v. Lord Eardley and Others.* 271
24. The words *tithes* and *hereditaments* occurring among words of general description in a grant, after a particular description of the thing intended to be passed, will not pass tithes in gross. *Ibid.*
25. A return of "*Nil*" a sufficient putting in charge under the *Nulum Tempus Act*, 9 Geo. 3. c. 16. *Ibid.*

TITLE.

See ISSUE.

TREES.

See TITHES 16.

TRUSTEES.

See CHARITY 3.

TURNIPS.

See TITHES 2, 7.

V.

VENDOR AND VENDEE.

1. A vendor is bound to know that he actually has that which he professes to sell. And even though the subject matter of the contract be known to both parties to be liable to a contingency which may destroy it immediately; yet if the contingency has already happened, the contract will be void. *Hitchcock v. Giddings.* Page 1
2. The execution of a bond for securing the payment of the purchase money is not a completion of the contract; and where fraud is made out, the Court will relieve against it. *Ibid.* 8
3. See NOTICE 1, 2.
4. See AUCTIONEER 1.

VICAR.

1. See TITHES 2, 19, 20.
2. See COMPOSITION, REAL 1.

VISITOR.

See CHARITY 1.

W.

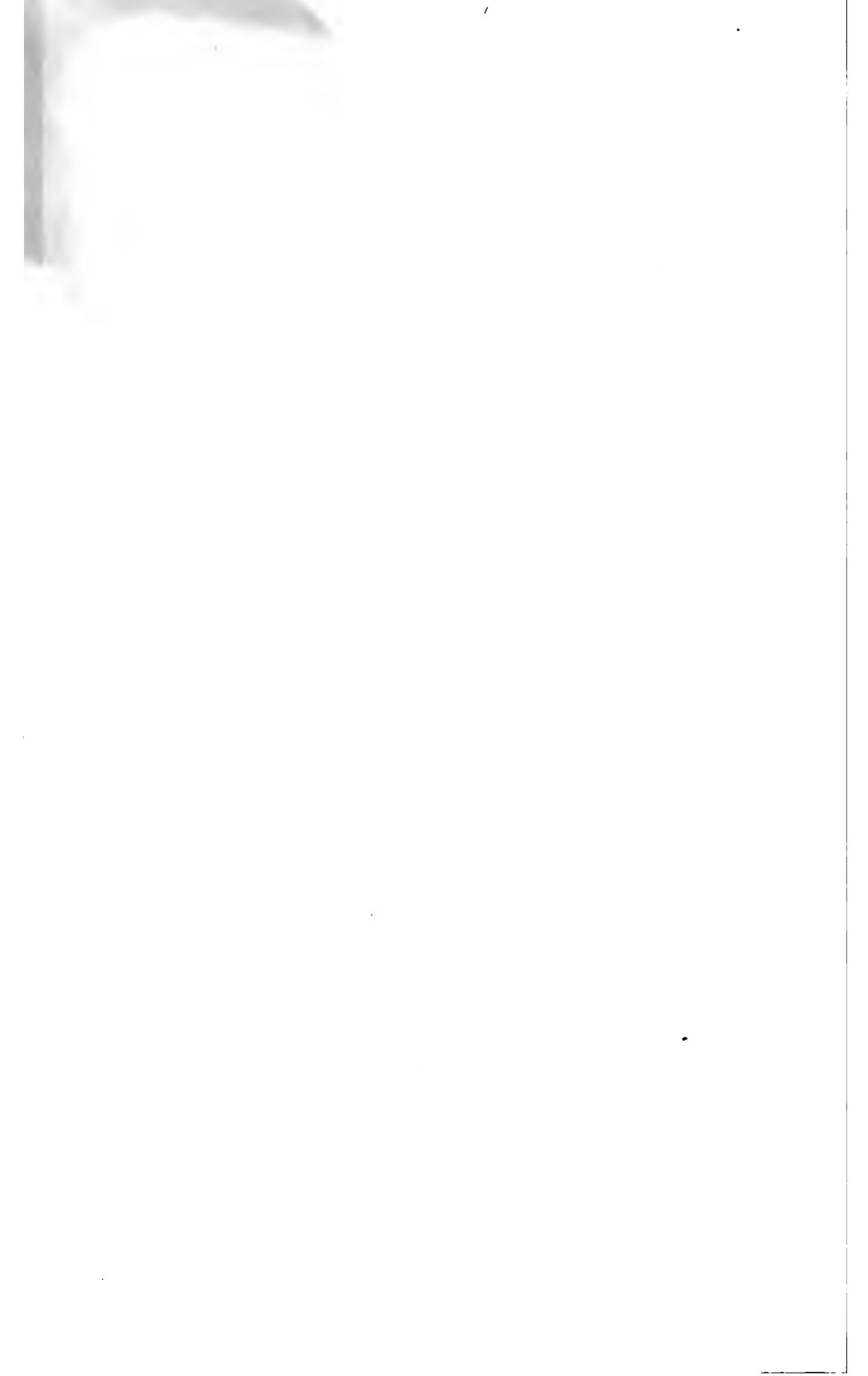
WOOD.

See TITHES 16.

WOOL.

See TITHES 14.

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